Major Events and Policy Issues in EC Competition Law, 2003–2004 (Part 1)

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This paper is designed to offer an overview of the major events and policy issues related to Arts 81, 82 and 86 EC in the last year.

The paper follows the format of previous years and is divided into three sections:

— A general overview of major events (legislation and notices, European Court cases and European Commission decisions).
— An outline of current policy issues, including legal privilege, private actions and Art.82 guidelines.
— Discussion of certain areas of specific interest, notably competition and the liberal professions, energy, sport and media and certain international issues.

Legislation and European court judgments are included in Part 1. The other sections will be included in Part 2, published in the next journal.

Box 1

- **Major Themes in 2004**
  - Enlargement: 10 new Member States
    - * With modernisation and decentralisation
      - No notifications/no immunity
      - Shared Art.81(3) EC
      - Now: Art.9 commitments and lapsed notification cases?
  - *Basics litigation*
    - * Still litigating what is an agreement
    - * Still litigating what the privilege against self-incrimination means
    - * Still litigating what legal privilege is
    - * BUT also highly complex Art.82 issues
      - E.g. compulsory licensing of IP
  - *Competition advocacy and the liberal professions*

In the author's view there have been *three* major themes this year.

The primary theme of the year in competition terms was the combination of Enlargement, modernisation and centralisation, turning around the focal point of May 1, 2004. On that day, 10 countries joined the EU, bringing a scale change and new systems of competition enforcement. The notifications system stopped. The "European Competition network" started. National courts were also given the right to apply Art.81(3) EC. The Transfer of Technology Block Exemption entered into force,[1] with market share ceilings and related Guidelines, completing the modernisation of Art.81 EC legislation.

Already, there have been developments with Regulation 1/2003, notably planned "Article 9" commitment decisions[2] and proceedings against previously notified practices, no longer covered by immunity. Companies and their lawyers are thinking about "self-assessment" rather than "To notify or not to notify?"!

The second theme of the year has been "basics litigation": In *Volkswagen II* and *Bayer Adalat*, on the question as to what is an agreement; in *Graphite Electrodes* and *Austrian Banks*, questions as to what material a company has to give the Commission in response to a request for information; and in *Akzo Nobel* questions as to what legal professional privilege covers. It is true that there are complex issues also, such as when, exceptionally, dominant companies may have to license their IP as in *IMS*, but it is striking to see basic issues like this coming up again, issues which should perhaps be clear by now.

The third theme has been the Commission's drive into the liberal professions. It appears that the Commission wants to push far fast. The Commission has started with a case involving *Belgian Architects* and a "Communication" urging self-review by the professions. It will be interesting to see how the issues develop or whether (like, for example, sport or air transport) matters will take a while to clarify and sort out.

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1. See, generally *Commission Press Releases* IP/04/511, April 21, 2004; IP/04/411, March 30, 2004.
2. Commitment decisions; MEMO/04/217, September 17, 2004.

Overview of major events

Legislative developments (adopted and proposed)

Box 2

- **Legislation/Notices**
  - — *Regulation 1/2003 and the related decentralisation package*
    - * *N.B.* Leniency provisions
    - * A narrowing of Art.81(1) EC?
  - — *New Transfer of Technology Block Exemption*
    - * Key new distinctions/limits
    - * Related "IP Guidelines"
    - * *N.B.* 4 technologies "*de minimis*" rule
  - — *Extension of EC procedural framework in air transport to third country routes*
    - * Finally!
  - — *N.B.* New draft revised Access to File Notice just published

Adopted

May 1, 2004: Overview

On May 1, 2004, there were huge changes to the way in which EC Competition law is enforced. Four aspects apply to general competition, the fifth is a new EC Merger Regulation with a new substantive test, not covered in this paper[3]:

- — First, the new Enlargement, with 10 new EU Member States.[4] This is probably the most important change, because it results in *a scale change* in the size of the EU, which moves from 15 to 25 Member States and a much wider geographic scope for EC Competition law.
- — Secondly, the modernising features of Council Regulation 1/2003.[5] These came into force on May 1, 2004. Above all with the abolition of notifications to the European Commission ("the Commission") for clearance of agreements.
- — Thirdly, the decentralisation aspects of Council Regulation 1/2003. Above all, the shared enforcement of *the whole* of Art.81 EC with national competition authorities ("NCAs") and national courts, meaning that they can also apply Art.81(3) EC, as well as the Commission.
- — Fourthly, the new investigatory powers of Regulation 1/2003. Above all, the new right for the Commission to inspect *private homes*, as well as company premises, if it is shown that evidence of infringement is likely to be there.

At the same time, a new procedural regulation entered into force, Commission Regulation 773/2004.[6] In the Spring of 2004, the Commission also finalised and adopted various notices on: Effect on trade; Art.81(3) EC; co-operation amongst the Commission and NCAs; co-operation amongst the Commission, NCAs and national courts; informal guidance on novel questions; and the handling of complaints.[7]

These documents were summarised in detail last year as drafts.[8] Some have changed a little, but generally they are much the same. (Key points are noted below.)

Enlargement

Enlargement involves four key changes.

- — First, the new NCAs join in the new "European Competition Network" ("ECN") of competition authorities, sharing enforcement of the EC rules with the European Commission (as well as enforcing their own national rules).
- — Secondly, since May 1, 2004, the Commission is able to intervene directly in the 10 new Member States, with inspections on company premises and new, controversial powers to carry out such inspections in private homes.[9]
- — Thirdly, there should be more focus on restrictions on trade and competition (i) among the 10 new Member States and (ii) between the 10 new Member States and the 15 old EU Member States. Previously, competition enforcement in or with these countries was a question for national laws or EC law and the Europe Agreements. Direct application of relevant EC rules is likely to be more direct and focussed on cross-border restrictions.
- — Fourthly, in the new Member States, we expect an enforcement drive on (i) "15 old Member State companies" (who arguably should know better) and (ii) also on former monopolies and oligopolies that came about through privatisation and still hold dominant positions.

Modernisation

This has been going on for some time. Seven points may be noted now.

3. See, Wilmer Cutler Pickering Hale and Dorr LLP, *Guide to EC Merger Regulation* (4th ed., September 2004).
4. Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia and the Czech Republic.
5. [2003] O.J. L1/1.
6. [2004] O.J. L123/18.
7. All are conveniently grouped in [2004] O.J. C101 and are otherwise available on the Commission's website. See, also Gauer, Kjølbye, Dalheimer, De Smijter, Schnichels and Laurila, *EC Commission Competition Policy Newsletter* (Summer 2004), pp.1–6.
8. [2004] I.C.C.L.R. 25–32.
9. Art.21 of Council Regulation 1/2003.

— First, the Commission has sought to focus on restrictions on competition by those with market power, involving more significant effects, with a greater emphasis on economic assessments than previously. In practice, that has meant vertical and horizontal block exemptions with market share ceilings and related guidelines, setting a review framework for situations where companies have market power and are not covered by the block exemption's "safe harbours".

— Secondly, the Commission has also modernised its legislation to fit a system with no notifications for "exemption" since, from May 2004, this was abolished. In practice, this means that companies and their advisers now cannot notify to obtain immunity from fines, if there is a perceived risk that an arrangement could be viewed so unfavourably as to justify them. There is still a possibility to obtain guidance from the Commission on cases involving novel questions, but this is intended to be of limited application, for "genuinely unresolved" questions. The Commission has also removed "grey-listed" (possibly unlawful) clauses from block exemptions and the related "opposition procedures" for tacit approval of notified agreements.

— Thirdly, although the focus on economic assessments is generally welcome, it has been at a price in terms of legal certainty. Notably, the introduction of market share ceilings on block exemptions means that there may often be more insecurity for companies. For example, if the relevant market for supply of a product is European, then one approach can be taken for Europe as a whole. If, on the other hand, there are national or regional markets with variations in market positions and market power, then corresponding variations may be required to the agreements to reflect these factual variations. Probably this should be welcomed insofar as it may lead to more precise, correct factual assessments, but it will make simple co-ordination of "European" wide trading positions difficult in many cases.

— Fourthly, there will also be more insecurity insofar as there will not be exemptions for a given period of time. This concern can be exaggerated, insofar as there were only few actual exemption decisions and a great deal of private practice has been about moving companies into broadly acceptable positions, with some risk of challenge but good arguments in defence, rather than notifying. That has not changed. Nevertheless, a clear issue is how time will be treated in EC competition rulings before NCAs and courts. It is no longer a question of a forward looking prediction for a period, justifying "exemption". It is more of a "snapshot" as to whether, at a given moment, a restriction is anti-competitive. It will be interesting to see if this will lead to different results in future rulings. It also remains to be seen for how long clearance decisions will be effective, given the risk that plaintiffs may seek their review and may not be clearly prevented from doing so, as with a formal exemption decision.

— Fifthly, it should be emphasised that the process of modernisation is also not over. This year we saw the third general area to be covered, with modernisation of the Transfer of Technology Block Exemption. However, there have also been discussions as to modernising Art.82 EC enforcement, with draft guidelines to come, it is suggested next year. Related to this, the Commission has indicated in its Transfer Technology Guidelines and Notice on Art.81(3) EC that dominant companies may have more scope to benefit from Art.81(3) EC, provided that the practice in question is not abusive.[10] This may well mean that the Vertical Restraints and Horizontal Guidelines will need related revision, since they both generally treat dominance, not abuse as the limit for Art.81(3) application.[11]

— Sixthly, since May 2004, the Commission appears to have started proceedings against various practices which had been notified previously and whose fine immunity lapsed with the entry into force of Regulation 1/2003, changing the situation hugely for those involved. (Some of these are described below.)

— Finally, the numerous new rules and "guidelines" will have to be tested to see how they work in practice. Phrases in the now numerous guidelines are useful, but no substitute for actual cases.

Decentralisation

There are also a few points on decentralisation which merit special mention.

First, special thought has been devoted to shared enforcement and the varying leniency programmes in most but not all EU Member States.

This has resulted in special undertakings by NCAs that information submitted by leniency applicants will not be passed on to another authority, without the consent of the leniency applicant,

10. [2004] O.J. C102/2, para.151; [2004] O.J. C101/97, para.106.

11. See the *Vertical Guidelines*, [2000] O.J. C291/1, paras 153, 211 and 222; *Horizontal Guidelines*, [2001] O.J. C3/2, para.36.

unless either the applicant has also applied for leniency in the same case before the receiving authority or the receiving authority has given a specific commitment not to use the information transmitted to impose sanctions on the leniency applicant or on its staff.[12] The Commission has also indicated in the Notice on co-operation with national courts that it will not transmit to a national court information voluntarily submitted by a leniency applicant without the consent of that applicant.[13]

Otherwise, because of the risk that a cartel case may be passed to different enforcing authorities one may note that multiple applications for leniency (at NCA and Commission level) may often still be advisable.

Secondly, it will be recalled that there is a rebuttable presumption that trade between Member States is not capable of being affected when the aggregate annual EU turnover of the companies concerned does not exceed €40 million and the aggregate market share of the parties on any relevant market within the EU affected by the agreement does not exceed 5 per cent.[14]

Thirdly, there has been a fair amount of discussion about the Art.81(3) EC Notice. Notably, it is argued that the Notice has narrowed the scope of application of Art.81(1) EC while making the Art.81(3) EC "exception" very demanding.

What is new for a Commission text is the statement that some market power is required for Art.81(1) EC to apply. We have always talked about the "appreciability" of restrictions. Now the Commission is going beyond "*de minimis*" effect concepts to say that, where effect is the basis for infringing Art.81(1) EC, some consumer impact and/or market power must be shown:

> "For an agreement to be restrictive by effect it must affect actual or potential competition to such an extent that on the relevant market negative effects on prices, output, innovation or the variety or quality of goods and services can be expected with a reasonable degree of probability".[15]

This is welcome insofar as one would think it is right to focus resources on the more important cases. What is troublesome, however, is that this may not be an easy line to define in practice.[16] The Commission says that all this simply reflects the modern view that both plaintiffs and regulators and defendants must have real evidence to substantiate their claims that Art.81(1) EC is infringed, or that Art.81(3) EC is met. If so, this is welcome, but it is true that, as drafted, the Art.81(3) EC Notice portrays that provision as the "exception" rather than a rule often met.

Fourthly, it is clear that the advice which practitioners are giving has already changed. Until now the tendency has been to assess closely the enforcement practice of the Commission in a certain field. Such assessments are now much more difficult, insofar as the test is whether *any* competition authority or court dealing with the case would find an infringement or would be likely to apply Art.81(3) EC. Practitioners therefore have to give a more general and, perhaps, more objective assessment than previously.

Fifthly, the Commission will still be key on the big issues. For the "Art.10" declaratory decisions (which only it can take and which are specifically designed to clarify the position on certain types of new or important practice[17]) and also because of the principles confirmed in the European Court of Justice ("ECJ") *Masterfoods* judgment.[18] It will be recalled that this judgment requires that national authorities and courts do not take decisions that run counter to a Commission decision or are likely to run counter to a Commission decision in proceedings on the same issue or matter. NCA decisions also still have to be co-ordinated with the Commission and other authorities. If a NCA were not to follow agreed EC Competition law, the Commission could still decide to take over a case[19] so, to that extent also, Brussels still has a special role to play.

Sixthly, there are some important points to note on work-sharing. Since May 1, 2004, a competition case can be dealt with by a NCA or the Commission in Brussels or handled by several NCAs or before a national court.

According to the principles of work-sharing, a "material link" between the infringement and the enforcing authority or authorities is required. It will be recalled that the key principles are that an authority is considered "well-placed" to deal with a case if (i) the behaviour of the parties has substantial effects for the territory in which the authority is based; (ii) the authority can effectively gather all relevant information; and (iii) the authority can effectively bring the infringement to an end.[20]

We expect those cases with their main competitive impact in a single Member State to be dealt with by the "local" NCA, since it should be best placed to deal with the case, unless a special principle or precedent is involved, in which case the matter may be dealt with by the Commission. On the other hand, if three or more EU Member States

12. Paras 39–42 of the "Notice on Co-operation between Competition Authorities"; see also, Blake and Schnichels, *EC Commission Competition Policy Newsletter* (Summer 2004), pp.7–13.
13. Para.26 of the "Notice on Co-operation with National Courts".
14. Para.52 of the "Notice on Effect on Trade".
15. Paras 24–27 of the "Notice on Art.81(3) EC".
16. See also Kjølbye, "The New Commission Guidelines on the Application of Article 81(1)" [2004] E.C.L.R. 566.
17. Art.10 and recital (14) of Council Regulation 1/2003.
18. Case C–344/98, [2000] E.C.R. I-11369, available on the European Court of Justice website.
19. See Art.11(6) of Council Regulation 1/2003.
20. Paras 8–9 of the "Notice on Co-operation between Competition Authorities".

are affected by a restriction, we expect the case to be handled in Brussels. In between, there may be joint action by NCAs or action by one NCA.

This may become a developing area. For example, it may be of interest to note that the Nordic competition authorities often appear to co-operate together and have signed an official agreement on such procedures. It may be that, in the years to come, interventions by other combinations of authorities, for example, the Spanish and Portuguese, or the Austrian, Czech and Slovak authorities should be expected.

In practice, one may also expect the Commission to pass cases to NCAs more willingly, unless it is thought that they may not be dealt with for lack of resources or other factors. The Commission could do this before, notably invoking *Automec II*,[21] but now it has even more incentive to do so, because it can leave the actual case to others and still be involved through the ECN.

Finally, it is emphasised that in applying EC Competition law the national authorities will follow their national procedural rules, which may involve important distinctions. For example, on recognition of legal professional privilege, which may be different where national rules apply to EC competition enforcement. Thus, in Portugal, it is argued that in-house counsel, who are still members of the Portuguese Bar, have such privilege. There are also variations in national practice on the privilege against self-incrimination.

The TTBE and related guidelines

The new Transfer of Technology Block Exemption ("TTBE") Commission Regulation 772/2004 and related guidelines (the "Transfer Technology" or "IP" Guidelines) were adopted on April 7, 2004 and entered into force on May 1, 2004.[22]

The main principles are as follows:

Transfer of Technology Block Exemption

First, the new TTBE reflects two key changes in comparison to the old one: (i) a distinction is made between competitors and non-competitors and (ii) the Block Exemption ("BE") is only available up to certain market share ceilings. Thus,

- If an agreement involves competitors which together have more than 20 per cent of the relevant technology or product market then the agreement cannot benefit from the BE.
- If an agreement involves non-competitors either of which on its own has more than 30 per cent market share on the relevant technology or product market, then again the benefit of the BE cannot be claimed.

Critically therefore some market assessment must now be made. Different "black-lists" for unacceptable provisions apply (so-called "hardcore" provisions). Whether companies are competitors is assessed at the time the agreement is entered into and, importantly, that status is retained even if they subsequently become competitors, unless there are substantial amendments to the agreement later.

Secondly, the BE applies to software copyright licensing, but not generally to licensing of rights in performances and other copyright, and not to trademarks. Licences must be for production of contract products, not just resale, and licences must be between two parties. The BE is also applicable to sub-licensing and sub-contracting provided that the primary purpose of the licence remains the production of contract products.[23] Settlement and non-assertion agreements are now normally covered by the BE.[24]

Thirdly, restrictions on a licensee using severable improvements and/or requiring their exclusive licensing or assignment to the licensor and no-challenge clauses are excluded from the BE. (It may be useful to recall that including "hardcore" provisions in an agreement means that the whole agreement falls outside the BE. An "excluded" provision just falls outside the BE to be assessed individually.)

Fourthly, the hardcore restrictions list has been revised as between the draft and the final TTBE.

- For competitors, the main black-listed provisions are: maximum and minimum price-fixing, reciprocal output limitations, certain market-sharing provisions and restrictions on a licensee's ability to exploit its own technology or pursue its own separate R&D. The BE is stricter for reciprocal than non-reciprocal agreements between competitors. Non-reciprocal output restrictions between competitors are now covered by the BE.
- In the case of non-competitors, the main hardcore restrictions are: minimum resale price maintenance, certain passive sales and restrictions on sales where a licensee is in a selective distribution system.
- The TTBE allows active sales bans on licensor and/or licensee, as well as customer and territorial restrictions on the licensor.
- It is noteworthy that, between non-competitors, you can restrict passive sales into the territory or customer group of another licensee during the first two years in which

21. Case T–24/90, *Automec v Commission* [1992] E.C.R. II-2223.
22. [2004] O.J. L123/11 and [2004] O.J. C101/2. IP/04/470, April 7, 2004. With thanks to Cormac O'Daly for his assistance with this section. See also [2004] I.C.C.L.R. 22.
23. See the IP Guidelines, paras 42 and 44.
24. See the IP Guidelines, paras 43 and 204–209.

the licensee is selling contract products in that territory.[25]

Fifthly, new licences have to comply with these rules already. Existing licences have to be brought into line by March 31, 2006 or fall to be considered under the general rules, not benefiting from the BE.

Transfer Technology Guidelines

These Guidelines are extensive. They explain the general application of Art.81(1) EC to licensing and the position of the TTBE in comparison to other BEs (such as Joint R&D and Vertical Restraints). They include comment on the TTBE itself and focus on certain types of agreement, considering the position if they are not covered by the TTBE.

Some of the more important general points are as follows:

- Outside the area of hardcore restrictions, Art.81 EC is considered unlikely to be infringed where there are four or more independently controlled, commercially viable, substitutable technologies on the relevant market, in addition to those controlled by the parties to the licensing agreement.[26]
- Market shares in technology markets are calculated for the purpose of the TTBE by reference to sales of products incorporating the licensed technology.[27]
- On a technology market, the parties are considered to be actual competitors, if the licensee is already licensing competing technology, apparently irrespective of where.[28] Potential competition on the technology market is not taken into account for the application of the BE.[29] However, potential competition may be relevant when assessing an agreement which falls outside the BE.[30]
- If the parties' own technologies are in a blocking position *vis-à-vis* another technology, the parties are considered to be non-competitors on the technology market. The Commission clearly will be critical before accepting such a claim.[31]
- If a licensed technology represents such a major (or breakthrough) innovation that the technology of the licensee becomes obsolete or uncompetitive, then licensor and licensee may not be considered competitors.[32]
- The buyer power of the purchaser of licensed products is taken into account in assessing whether the parties to the licence have market power (in individual assessment cases).[33]
- The Commission appears open to economic arguments on the application of Art.81(1) and (3) EC: "Article 81 cannot be applied without considering the *ex ante* investments and the risks related thereto. The risk facing the parties and the sunk investment that must be committed to implement the agreement can thus lead to the agreement falling outside Article 81(1) EC or fulfilling the conditions of Article 81(3) EC, as the case may be, for the period of time required to recoup the investment".[34]
- As noted above, the Commission refers to the limits of Art.81(3) EC clearance as "precluding any application of the exception rule to restrictive agreements that constitute an *abuse* of a dominant position"[35] (emphasis added). Therefore, the fact that an agreement is concluded by a dominant firm does not in itself act as a bar to exemption.

Thereafter the Commission discusses various specific obligations/restrictions:

- Royalties
- Exclusive licensing and sales restrictions
- Output restrictions
- Field of use restrictions
- Captive use restrictions
- Tying and bundling
- Non-compete obligations
- Settlement and non-assertion agreements
- Technology pools

Running through this part of the Guidelines is the theme that a licensor is not expected to create direct competition to himself. There is also a general sliding scale of concern: reciprocal agreements between competitors are treated most cautiously (fearing that they amount to simple market-sharing); then non-reciprocal agreements between competitors; and then agreements between non-competitors.

The following points are of particular interest, where an agreement is not covered by the BE.

Generally, so-called "*running royalties*" (meaning royalties based on product sales) are considered to be a normal form of revenue collection.

However, in a limited number of cases, royalty obligations between competitors may be viewed as price-fixing, *e.g.* where competitors cross-license and provide for reciprocal running royalties and it is considered that the licence is devoid of a

25. Art.4(2)(b)(ii) TTBE.
26. Para.131.
27. Para.23.
28. Para.28.
29. Para.30.
30. Para.66.
31. Para.32.
32. Para.33.
33. Para.137.
34. Para.147.
35. Para.151.

pro-competitive purpose.[36] In addition, the Commission considers that calculating royalties on the basis of *all* licensee sales, regardless of whether the licensed technology is being used, is a hardcore restriction deterring a licensee from using his own technology.[37]

With respect to exclusive licensing between competitors, outside the TTBE, the Commission will examine the competitive significance of the licensor. Where the licensor is only competing on the technology market and is, for example, a small research institute, there is unlikely to be an infringement of Art.81(1) EC.[38] Exclusive licensing to non-competitors is viewed favourably. It may not fall within Art.81(1) EC at all. If it does, the Commission states that it will generally fulfil the conditions of Art.81(3) EC. It is acknowledged that exclusivity may be required in order to induce investment by a licensee.[39] However, it is said that intervention may be warranted where a dominant licensee obtains an exclusive licence and entry into the technology market is difficult.[40]

Above the BE market share ceiling non-reciprocal sales restrictions between competitors may be within Art.81(1) EC, if either licensor or licensee has market power. However, such restrictions may be indispensable to protect other licensees' investments.[41] Outside the BE, sales restrictions imposed between non-competitors are still viewed favourably. Restrictions on a licensee may fall outside Art.81(1) EC, if without the restrictions, the licensing would not occur. A technology owner is also not expected to create competition with himself, so restrictions on a licensor are likely to fulfil the conditions of Art.81(3) EC.[42] Between licensees, while restrictions on active sales may fulfil Art.81(3) EC, the Commission considers that Art.81(3) EC is unlikely to apply to restrictions on passive sales exceeding the two year period provided for in Art.4(2)(b).[43]

Non-reciprocal output restrictions between competitors can now come within the BE. The favourable approach continues outside the BE, as Art.81(3) EC is said to be likely to apply, at least where the licensor's technology is substantially better than the licensee's and the output restriction substantially exceeds the licensee's output prior to the agreement.[44] The argument is that such restrictions may be required as an incentive for the licensor to grant the licence in the first place.

On field of use restrictions, the Commission emphasises that the parties have to define their fields of use objectively by reference to "identified and meaningful characteristics of the licensed product" or they risk a finding that the restriction constitutes a customer restriction.[45] Reciprocal field of use clauses between competitors, when combined with exclusive or sole territories, are considered to be hardcore restrictions.[46] There is also some caution with regard to cross-licensing between competitors, where an agreement provides for asymmetrical field of use restrictions, *i.e.* where one party is permitted to use the technology within one product market or technical field and the other is permitted to use it within a different product market or field of use.[47]

Complex as this all is, it is a huge improvement on the old TTBE. However, clearly the introduction of market share ceilings creates new uncertainties. We still do not know a lot about how the Commission will deal with situations involving market power.[48] In addition, there is much work to do now, seeing if existing licences need revision or termination, given changes under the new rules.

Air transport between the EU and third countries

In February 2004, the EU Council adopted Council Regulation 411/2004, giving the European Commission a procedural framework to review airline transactions which have an impact on routes between the EU and third countries.[49] No more complex, direct reliance on the EC Treaty and complex co-operation with national authorities for intervention in Airline Alliance cases (although presumably such co-operation will continue, but now under the general "ECN" framework). Previously the Commission had to rely on (what is now) Art.85 EC, (the former Art.89 EC), which was cumbersome and did not confer on the Commission the power to impose remedies.[50]

The change appears to have come about mainly because of the ECJ's judgment in the "*Open Skies*" cases in 2002,[51] which established that Member States acted illegally when they entered into agreements with the United States on a number of issues where the Community has exclusive competence. It also fits in with the new spirit of ECN enforcement, especially as the Airline Alliance cases patently have broad EU implications.

36. Paras 80 and 157.
37. Para.157.
38. Para.164.
39. Para.165.
40. Para.166.
41. Paras 170 and 171.
42. Paras 172 and 173.
43. Para.174.
44. Para.175.
45. Para.180.
46. Para.181.
47. Para.183.
48. See also Monti: "The new EU Policy on Technology Transfer Agreements", SPEECH/04/19, January 16, 2004.
49. IP/04/272, February 26, 2004; [2004] O.J. L68/1.
50. See, *e.g.* [2003] I.C.C.L.R. 93–94.
51. See, *e.g.* Case C–466/98 *Commission v United Kingdom* [2002] E.C.R. I-9427. (There were several cases.)

Proposed

Market access to port services

In October 2004, the Commission adopted a new proposal for a Directive on Market Access to Port Services, which would introduce specific rules on access to port services and aiming at the creation of a level playing field in competition between ports.[52] The proposal addresses two main issues: (a) intra-port competition (competition between providers of the same port service within a port) and (b) inter-port competition (competition between ports).

The Directive applies to ports with 1.5 million tonnes and/or 200,000 passengers per year. The services concerned are pilotage, towage, mooring cargo and passenger handling.

As regards intra-port competition, authorisations for service providers are mandatory and a system for providing authorisations is established. The Directive requires objective, transparent and non-discriminatory criteria for granting authorisations, which should be relevant, proportional and public.

The method used for granting the authorisation determines what will happen in the event of a later limitation in the number of service providers of a port service. Thus, when such a limitation arises, authorisations which have been granted through a selection procedure must remain unchanged, whereas authorisations which have been granted without a selection procedure are to be terminated and reconsidered with a selection procedure. Compensation is foreseen for the existing service provider for past, not fully amortised investments, if he does not win the selection procedure. As regards pilotage, authorisations may be subject to criteria related to public service obligations and maritime safety. Self-handling should be allowed subject to an authorisation, granted in an efficient and expedient manner and remain in force for as long as the self-handler complies with the criteria for granting it.

As regards inter-port competition, the managing body of the port is required to have transparent accounting. The Financial Transparency Directive is considered applicable to all ports covered by the proposed Directive. State Aid guidelines are to be adopted by the Commission within a year after the adoption of the Directive.

Access to file

In October 2004, the Commission published a Communication inviting comments on a draft Access to File Notice to replace the previous one from 1997.[53] The draft takes into account (amongst other things) Regulation 1/2003 and recent case law such as the CFI *Cement* judgment.

The following are the main points of interest for general enforcement (not focussing on separate merger control issues):

- The Commission continues with the position that access to file is a right of defence and therefore can only be asserted after a Statement of Objections.[54] (This is a point of continued controversy where many argue that principles of fairness and good administration should allow earlier access, at least for the parties.)
- Importantly for cartel leniency cases, where minutes are taken and agreed by the undertaking in question, they may be accessible after deletion of any business secrets or other confidential information (and may be evidence relied on in the case).[55]
- Most documents passing within the ECN will not be accessible. However, documents emanating from Member States, the EFTA Surveillance Authority or EFTA States may be disclosed where they contain allegations brought against a party that the Commission must examine, or that form part of the evidence in the investigative process, similar to documents from private parties.[56]
- Material may be withheld, if its disclosure would significantly harm a person or undertaking. This may be used to protect anonymous complainants or third parties where retaliation is feared.[57] (It is, however, a right which defendants dislike because they fear they are missing part of the case against them.)
- The Commission states that it generally presumes that turnover, sales, market-share and similar data which is more than five years old is no longer confidential.[58]
- The draft notice underlines that even confidential information may have to be disclosed if it is necessary to prove an infringement or to exonerate a party.[59]
- The draft Notice states that in Art.81 and 82 cases, access will be granted "on one single occasion". Generally, no access is given to replies of other parties to Statements of Objections, although further access may be necessary if documents received after the issue of the Statement of Objections constitute new evidence against a party.[60]

52. IP/04/1212, October 13, 2004.
53. [2004] O.J. C259/8. For the current notice, see [1997] O.J. C23/3.
54. Paras 1 and 3.
55. Para.12.
56. Para.15.
57. Para.18.
58. Para.22.
59. Para.23.
60. Para.26.

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— Complainants do not have the same rights of access as parties, but may be given access to documents on which the Commission has based its provisional assessment if they contest the Commission's rejection of a complaint.[61]
— There are procedures for appeals on confidentiality issues to the Hearing Officer.

Finally and importantly again for (plaintiff) cartel cases, the Commission underlines that access is only for the purposes of its administrative proceedings. If documents are used otherwise and counsel are involved, the Commission may complain to national bars.[62] This is a big issue since the sanction appears weak and one may also think that the focus should be on the party, not the lawyer. Apparently in the *Austrian Banks* cartel case, a political party was admitted as a third party to the proceedings and made the non-confidential Statement of Objections public despite an instruction from the Hearing Officer not to do so![63]

Liner shipping conferences

In October 2004, the Commission adopted a "White Paper" aiming to bring more competition to the maritime sector.[64] The Commission suggested modifying or repealing the existing Council Regulation 4056/86 on the application of Arts 81 and 82 EC to maritime transport, or replacing it with other instruments, such as guidelines.

It will be recalled that shipping companies have traditionally organised themselves as liner conferences, whereby they would agree common or uniform freight rates in order to provide regular scheduled maritime transport services to shippers and freight forwarders. The 1986 Regulation contains rules which exempt price-fixing, capacity regulation and other agreements or consultation between liner shipping companies from Arts 81 and 82 EC. The justification for these exemptions has been the view that the rate-setting and other activities of liner conferences lead to stable freight rates, allowing shippers to offer reliable scheduled maritime transport services. As noted last year, the Commission is campaigning for modernisation, repealing these exemptions.[65]

61. Para.30.
62. Para.47.
63. [2004] O.J. C48/7.
64. IP/04/1213, October 13, 2004.
65. The Commission also issued a consultation paper concerning Commission Regulation 1617/93, relating to IATA Consultations on Passenger Tariffs on Scheduled Air Services and Slot Allocation to Airports in June 2004; the text is available on the Commission's website.

European Court cases (ECJ and CFI)

Box 3

- **Main European Court Cases**
  - — Article 82 EC
    - * *BA Virgin*—Classic fidelity rebates judgment (again)
    - * *IMS*—Compulsory licensing (exceptionally)
    - * *Syfait*
      - A.G. Jacobs' opinion
      - Suggests that it is not abusive for a pharmaceutical supplier to withhold a product to prevent parallel trade, in the current exceptional circumstances
  - — What is an agreement?
    - * *Volkswagen/Bayer Adalat*
    - * Exhortations not enough
    - * Continuous commercial relations not enough
    - * Specific acquiescence to the particular unlawful conduct required

Article 82 EC cases

BA Virgin

In December 2003, the Court of First Instance ("CFI") upheld the Commission's decision in *BA/Virgin*.[66] British Airways ("BA") had appealed against the Commission's decision that it had abused its dominant position as a purchaser of UK air travel agency services, by applying a growth bonus. The Commission fined BA €6.8 million.

There has been much discussion about the judgment (as *Michelin II*[67]), mainly because dominant companies would like to be allowed to use incentive bonuses and see them as "normal competition".

BA had agreements with travel agents in the United Kingdom in order to sell tickets there. Until 1997, BA applied two flat rate commissions: 9 per cent for international tickets and 7.5 per cent for domestic tickets. In addition, BA applied various financial incentives, including a performance bonus, calculated by reference to the growth of sales of BA tickets from one financial year to another.

Subsequently, after a complaint by Virgin and a Commission procedure, in 1998 BA adopted a different system of performance bonuses based on a new, lower basic commission rate of 7 per cent on all tickets sold (irrespective of destination), with an extra commission of up to 3 per cent on international tickets and 1 per cent on domestic tickets for growth in sales. Growth was measured against the corresponding month in the previous year. Bonuses applied not only to the growth element,

66. Case T–219/99, judgment of December 17, 2003.
67. Case T–203/01, judgment of September 30, 2003.

but also to all sales of BA tickets during the reference period in question.

On a second complaint by Virgin, the Commission found that BA had infringed Art.82 EC. BA was considered a dominant purchaser of travel agency services for distributing tickets in the United Kingdom. The Commission found essentially two abusive aspects in BA's performance bonus system:

- There was discrimination insofar as BA's reward scheme could entail the application of different commission rates to an identical amount of revenue, because the rate of increase in sales of BA tickets could differ from one agency to another.
- The system was loyalty inducing, because it restricted agents' freedom to supply their services to other airlines, without the system being based on any economically justified consideration.

The CFI agreed. Several points may be noted.

First, the Court found that it made no difference that BA was a dominant purchaser (as opposed to a seller) of services. Article 82 EC applies equally to companies in a dominant position in relation to their suppliers and those in the same position as regards their customers.[68]

Secondly, the Court found that it did not matter that BA might not be dominant in the transport markets affected by its conduct on the agency services market. Quoting *Commercial Solvents*,[69] the Court stated that an abuse committed on a dominated product market, the effects of which are felt in a separate market on which the company concerned does not hold a dominant position, may fall within Art.82 EC, provided that the separate market is closely connected to the first.[70] This was the case here.

Thirdly, BA was found to be in a dominant position despite a fall of some 6 per cent in its share of air ticket sales handled by members of the largest UK travel association in the previous four years. The Court noted that BA still had almost 40 per cent, a multiple of its nearest rivals (such as Virgin on 5.5 per cent) and still had a "very largely preponderant share" of the agents' business. Moreover, BA offered more routes and frequencies from the United Kingdom than its rivals, so it was an obligatory business partner for travel agents there. The Court also considered that the way that BA had reduced the flat rate commission to introduce its new combined flat rate and performance based system was indicative of market power.[71]

Fourthly, the Court upheld the Commission's position on discrimination.[72]

Fifthly, the Court repeated what has now become the classic explanation of the fidelity rebate rules.[73] Dominant companies have a special responsibility not to distort competition. A dominant company may defend its commercial interests, but not with behaviour whose purpose is to strengthen that dominant position.

A system of rebates whose effect is to prevent customers from obtaining supplies from market competitors is considered abusive for a dominant company. Quantity rebate schemes linked to efficiencies and economies of scale which result in lower tariffs to customers are lawful, but, where such positive effects are not proved, an unlawful "fidelity-building" effect may be inferred. Actual exclusionary effects do not have to be shown, if it is clear that the conduct concerned is capable of having, or likely to have, such an effect.[74]

Sixthly, on the facts the Court found that BA's system was "fidelity-building". The Court noted that the system gave greatly increasing rewards to travel agents for increased sales and disproportionate reductions in the rate of performance reward if an agent's sales of BA tickets fell. The Court agreed with the Commission that BA's rivals could not attain a "level of revenue capable of constituting a sufficiently broad financial base to allow them effectively to establish a reward scheme similar to BA's in order to counter the exclusionary effect of that scheme".[75]

To the extent that BA granted additional commission on all tickets sold, rather than on just the tickets sold once a sales target was reached, the Court also found that there was no objective economic justification for the scheme. As such, BA was found to have had "no interest" in applying the scheme other than ousting rival airlines.[76] The likelihood of exclusionary effects had also been shown, given that 85 per cent of all air tickets in the United Kingdom were sold through agents, which generally had to do business with BA. Nor was it necessary to show damage to consumers, if there was objective detriment to the structure of competition itself[77] (relying on *Continental Can*[78]).

Finally, the Court rejected BA's argument that it had a legitimate interest in the rebate scheme (other than ousting rivals). BA argued that the incentive scheme should be accepted: (i) because it was impossible to calculate the precise cost savings involved in particular ticket supply; and (ii) because, given the air transport industry's high fixed costs, improvements in capacity utilisation yielded lower average unit costs, which BA is entitled to share with agents and customers. The Court would not

68. [101].
69. Joined Cases 6 and 7–73, [1974] E.C.R. 223.
70. [127].
71. [217]–[219] and [224].
72. [234]–[240].
73. [241]–[249].
74. [293].
75. [278].
76. [288].
77. [311].
78. Case 6/72, [1973] E.C.R. 215.

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accept this. It noted the lack of precise correlation between the amount of benefit from increased seat occupancy and the amount of performance bonus to the agent. It even considered that the amount of increased rewards payable to agents might *exceed* the profits to BA from the higher occupancy rate.[79]

Interestingly, this was not the same chamber of the CFI as in *Michelin II*. Within a few months therefore, the CFI has confirmed its orthodox position on fidelity rebates twice in clear terms. Given that modernisation of Art.82 EC was already in the air, it may be thought that the CFI wished to point out clearly that it does not wish these specific rules to change.

In practical terms, after *Michelin* and *BA/Virgin*, it is confirmed that dominant companies should generally avoid performance bonuses based on individualised growth, payable retrospectively on all sales achieved. However, one may think that standard scales of increased rewards, backed by reasonably precise, proven economic justifications and payment of rebate just on additional sales after a given scale step, should be lawful. That will not allow dominant companies to do everything their smaller competitors can (which will remain controversial), but it will allow companies to give some incentives for increased performance.

It may be thought somewhat harsh of the Court to have found no legitimate interest on the part of BA in the scheme. Part of BA's aim appears to have been to reduce a large "flat rate" commission approach and replace it with a more performance based system, which may well be laudable in competitive terms. Unfortunately, as so often happens in these cases, certain additional, arguably non-essential, features of a bonus scheme may affect its whole characterisation and mean that it is condemned rather than upheld. The key for the dominant undertaking is to see whether they actually need those extra features, given their market strength.

IMS

In April 2004, the ECJ gave its judgment in a preliminary ruling concerning the *IMS Health/NDC Health* case.[80] We have noted the parallel European Commission and Court proceedings before.[81]

The case arose because IMS Health ("IMS") developed a way of gathering information on pharmaceutical sales and prescriptions in Germany, using a matrix for classification of the information, called a "brick" structure. This structure involves some 1860 "bricks" or units, on the basis of which IMS Health had been selling regional data to pharmaceutical companies. There was evidence (although also some dispute) about the extent to which the customers for this information had helped IMS to develop the structure. IMS claimed copyright in it (a position confirmed in German courts).

A former employee of IMS started to offer competing services based on a different classification structure, but with little success because customers argued that the data had to follow the "1860" structure (or other structures based on it) to be comparable with earlier studies and because it was the accepted structure. In those circumstances, NDC (which had acquired the former employee's business) argued that the brick structure was a *de facto* legal standard and that IMS should be obliged to license it to NDC, or else it would eliminate all competition.

The Commission agreed with NDC in these exceptional circumstances and ordered interim measures. However, the CFI subsequently suspended such measures, pending the determination of the main proceedings, mainly for reasons related to the balance of convenience. Later the Commission then withdrew its order on the basis of lack of urgency.

In parallel, IMS had sued for breach of copyright and an injunction to stop NDC using its brick structure, by proceedings before the Frankfurt Landgericht.

Importantly, the referring court found that IMS had distributed its "brick structures" free of charge to pharmacies and doctors' surgeries, which had helped the structures to become the normal industry standard to which its clients adapted their information and distribution systems. The Court then made a reference to the ECJ, considering that, if there were an abuse of dominant position, IMS would have to license. There were essentially three questions:

(1) Was it abusive to refuse a copyright licence where the licensee seeks access to the same market on which the owner of the copyright has a dominant position?
(2) Is it relevant that the owner had involved customers in creating the databank protected by copyright?
(3) Is it relevant to consider the "material outlay/costs" which clients would incur if they were to go over to a competitor, when considering the abusive conduct of the copyright owner.

The ECJ's answers were essentially "yes" to questions 2 and 3 and "it depends" to question 1.

The Court looked first at whether access to the brick structure was "indispensable" and in the process considered questions 2 and 3. Applying *Bronner*,[82] the Court held that, for a product or service to be indispensable, it had to be established at least that the creation of competing products or services was not economically viable *on a scale*

79. [289]–[290].
80. Case C–418/01, judgment of April 29, 2004.
81. See [2002] I.C.C.L.R. 64–65.
82. Case C–7/97, *Oscar Bronner v Mediaprint* [1998] E.C.R. I-7791.

comparable to that of the undertaking which controlled the existing product or service. If it were proven that the pharmaceutical companies had participated in developing the 1860 brick structure, that may have created a user dependency on that structure at a technical level. If so, that would be relevant. Equally, in such circumstances, it would be likely that customers would have to make exceptional "organisational and financial" efforts in order to acquire regional sales studies based on another structure. That might force the rival supplier to offer the rival products on such terms that it would not be economically viable on a scale comparable to IMS. That might make the brick structure indispensable to market access, a question which the national court had to assess on the facts.

Turning then to *question 1*, the Court was faced with argument as to whether the *Magill* criteria for compulsory licensing were met. The Court summarised that case and stated that for *Magill* to apply it had to be shown that: (i) the refusal to license was preventing the emergence of a new product for which there was potential consumer demand; (ii) such refusal was unjustified; and (iii) the refusal would exclude any competition on a secondary market.

The Commission argued that it was not necessary for the refusal to be on a separate market to that in which competition was denied. It simply had to relate to a "stage of upstream production".

The Court's view appears to be that there must be two markets, but then suggested ways in which it may be easy to infer the upstream market. Notably, the fact that an upstream product or service (such as the delivery service in Bronner) is not marketed separately, does not mean that a separate upstream market does not exist, if such a potential or hypothetical market can be identified.

However, then the Court focussed on whether the refusal to license prevented the emergence of a new product. The Court noted: "in the balancing of the interest in protection of copyright and the economic freedom of its owner, against the interest in protection of free competition, the latter can prevail only where refusal to grant a licence prevents the development of the *secondary market* to the detriment of consumers"[83] (emphasis added).

Moreover, a refusal to allow access to a product protected by copyright, where that product is indispensable for operating on a secondary market was only abusive: "where the undertaking which requested the licence *does not intend to limit itself to duplicating the goods or services already offered on the secondary market by the owner of the copyright, but intends to produce new goods or services*"[84] (emphasis added). Whether there were, in fact, two markets here, or whether NDC would produce new products was left to the national court to determine.

In practice, the Court therefore summarised that a refusal to licence would be abusive if:

(1) NDC intended to offer new regional sales data products or services, not offered by IMS and for which there is potential consumer demand;
(2) IMS' refusal is not objectively justified; and
(3) IMS' refusal reserved to IMS the data services market in question by eliminating all competition therein.

It will be interesting to know what the national court finds. The criteria are demanding and one may wonder how "new" a product NDC is really contemplating or the Court will require.

This remains therefore a hugely controversial and difficult area, where it is only in exceptional cases that compulsory licensing will be ordered. The judgment may also put in doubt the reasoning in some earlier Commission decisions. In other words, it is clear that *Magill* was about a new product: a comprehensive TV listings guide. It is less clear that the port cases were about new products, unless one treats new frequencies or types of transport as new products or services.

In any event, IP holders may be somewhat pleased with the general respect for their rights, albeit that the Court is still saying that it is possible to override such rights in exceptional cases.

What is an agreement?

In the course of the year there have been two judgments on what constitutes an agreement, following on from *Volkswagen I* last October.[85] First, in December 2003, the CFI annulled the Commission's decision finding that Volkswagen's calls to its dealers to raise the prices of VW Passat sales were unlawful.[86] Then, in January 2004, the ECJ upheld the CFI's ruling in *Bayer Adalat* that the Commission had not proved the existence of an agreement between Bayer and its Spanish and French wholesalers to prevent parallel imports into the United Kingdom.[87]

Volkswagen II

The case was an appeal against the Commission's decision in 2001 to fine Volkswagen almost €31 million for "setting the price of the VW Passat *on the basis of exhortations* to its German authorised dealers to grant limited discounts or no discounts at all

83. [48].
84. [49].

85. Case C–338/00, judgment of September 18, 2003.
86. Case T–208/01, judgment of December 3, 2003.
87. Joined Cases C–2/01 P and C–3/01 P, *Bundesverband der Arzneimittel-Importeure and Commission v Bayer*, judgment of January 6, 2004.

to customers in selling the VW Passat"[88] (emphasis added).

The issue was whether the Commission could find that there was an unlawful agreement between Volkswagen and its dealers, merely because they had entered into distributorship agreements which were then followed up by calls not to discount. The Commission argued that, by entering into the underlying distribution agreement, the dealers had already agreed to follow the manufacturer's policy and had therefore agreed to follow such "exhortations" to raise prices. Volkswagen argued that for an agreement to be caught by Art.81(1) EC it is necessary to show a "concurrence of wills". One could not infer from entering into a lawful distributorship agreement that a dealer had agreed to accept later, unlawful contractual variations. In order to prove an infringement here, the Commission had also to show that dealers had "acquiesced" in or accepted the exhortations in issue and, at least, had also changed their conduct in relation to prices. In short, Volkswagen argued that its actions were unilateral and that the Commission had not shown that the dealers acquiesced in Volkswagen's exhortations not to discount.

The CFI agreed with Volkswagen and was critical of the Commission's approach. There had been other (Court) cases where dealers were found to have accepted apparently unilateral conduct by a manufacturer in the context of continuing relations with dealers. However, the Court stressed that in such cases the Commission has to establish the acquiescence of other contractual partners, express or implied, in the attitude adopted by the manufacturer. In previous cases it had done so. On the facts here, the Commission had not shown that the exhortations in issue were implemented in practice.[89] Moreover, the Court stressed that it could not be said that an unlawful contractual variation could be accepted as having been accepted in advance upon and by the signature of a lawful distribution agreement.[90]

The Court also rejected the Commission's interpretation of earlier case law, noting that the cases concerned turned on distributors accepting conduct which was necessarily unlawful, not acquiescence in advance to an, as yet, unknown policy of the manufacturer. Other cases had therefore involved a proven concurrence of wills.

Bayer Adalat

In January 2004 the ECJ confirmed the CFI's judgment overturning the Commission's *Bayer Adalat* decision.[91] The Commission and certain pharmaceutical importer associations had appealed. There are three points of particular interest.

First, the way the parties addressed the underlying policy debate. Notably, the Commission argued that the CFI's restrictive interpretation of what constituted an agreement and its stricter requirement as to proof thereof called "into question the policy pursued by the Commission in fighting restrictions of competition based on hindrances to parallel imports".[92] Bayer, on the other hand, argued that the Commission was seeking to establish "hindrance to parallel imports" as "being in itself" an infringement of (what is now) Art.81(1) EC[93] and to catch unilateral measures which could only be challenged if carried out by a dominant company.

Secondly, the focus of the Court on the specific issue as to whether an agreement to restrict competition had been entered into in the circumstances. Importantly, the ECJ noted that in this case there was "a simple refusal to sell and not a sale allegedly subject to certain conditions imposed on distributors".[94]

The Court then went on to distinguish any wider Commission objective. The fact that Bayer's unilateral policy of quotas and the national requirement that wholesalers offer a full product range produced the same effect as an export ban, did not mean that Bayer had imposed such a ban, nor that Bayer and the wholesalers had entered into an agreement not to export.[95] Agreeing with Bayer, the Court observed:

> "[t]o hold that an agreement prohibited by [what was then] Article 85(1) of the Treaty may be established simply on the basis of the expression of a unilateral policy aimed at preventing parallel imports would have the effect of confusing the scope of that provision with that of Article 86 of the EC Treaty".[96]

Then, in terms entirely in line with the CFI in *Volkswagen*, the ECJ went on:

> "The mere concomitant existence of an agreement which is in itself neutral and a measure restricting competition that has been imposed unilaterally does not amount to an agreement prohibited by that provision. Thus, the mere fact that a measure adopted by a manufacturer, which has the objective or effect of restricting competition, falls within the context of continuous business relations between the manufacturer and its wholesalers is not sufficient for a finding that such an agreement exists".[97]

Thirdly, the ECJ distinguished *Sandoz*,[98] which appears to have been a key part of the Commission's approach here. The Court noted that, in Sandoz, an agreement was found when Sandoz placed the

88. Case T–208/01, judgment of December 3, 2003.
89. See [32]–[38].
90. [43]–[45].
91. Joined cases C–2/01P and C–3/01P, judgment of January 6, 2004.
92. [65].
93. [69].
94. [86].
95. [88].
96. [101].
97. [141].
98. Case C-277/87, *Sandoz Prodotti Farmaceutici v Commission*, [1990] ECR I-45.

words "export prohibited" on invoices (*i.e.* demanded a particular line of conduct from dealers) and dealers still paid the relevant invoices and kept ordering. In other words, the manufacturer had imposed an export ban which had been tacitly accepted by the wholesalers.[99] Here the Court emphasised that Bayer had not imposed an export ban on its wholesalers and the wholesalers had not manifested an intent not to export. On the contrary, wholesalers had taken measures to circumvent Bayer's unilateral system in order to keep exporting.[1]

The theme of these judgments for competition authorities and plaintiffs is clear: Prove the specific agreement not to export by dealers and distributors, not just the manufacturer's desire to achieve that objective.

Syfait—A.G. Opinion[2]

In October 2004, A.G. Jacobs delivered his Opinion in an Art.234 EC reference case from the Greek Competition Commission, where that Commission asked the ECJ to clarify whether and in what circumstances a dominant pharmaceutical company may refuse to meet orders from wholesalers in order to limit parallel trade.[3]

The Greek Commission launched an investigation in November 2000, after various Greek associations of pharmaceutical wholesalers, including Syfait, complained that Glaxosmithkline ("GSK", formerly Glaxowellcome) had stopped meeting all of the wholesalers' orders for certain products. GSK claimed that wholesalers, by exporting a large proportion of their orders to other EU Member States where prices were much higher, had caused shortages on the Greek market. GSK initially stated that it would only supply hospitals and pharmacies, but subsequently reinstated supplies to wholesalers in limited quantities.

The Greek Commission considered that GSK enjoyed a dominant position at least in one of the products in question, "Lamictal" (an anti-epileptic drug). On that basis, in August 2001, it granted interim measures and ordered GSK's Greek subsidiary to meet in full the orders from wholesalers, limited to the supplies it received from the parent company. However, supplies through GSK's Greek subsidiary were sufficient to satisfy the demand on the Greek market, but not the wholesalers' much larger orders for parallel trade. Following hearings, the Greek Commission decided in January 2003 to suspend the case and refer various questions to the ECJ.

The Greek Commission considered that unrestricted parallel trade could seriously undermine the financial interests of pharmaceutical manufacturers, eroding their revenues and disrupting their organisational arrangements in Member States where products are exported. It also noted that parallel trade mainly benefited wholesalers rather than consumers and that, since Member States are the effective purchasers of most pharmaceutical products, through health schemes, they can lower national prices, if they want to pay less.

The Greek Commission asked the Court whether and on which conditions the protection of legitimate commercial interests can justify a restriction of supply by a dominant pharmaceutical company in order to limit parallel imports.

A.G. Jacobs noted that, based on the case law of the Court, a refusal to supply by a dominant undertaking is an abuse only in exceptional circumstances, after close scrutiny of the specific factual and economic context of each case shows serious harm to competition.

He considered that a refusal to supply in order to limit parallel trade does not amount *per se* to an abuse within the meaning of Art.82 EC, because a dominant company is not obliged to meet orders which are "out of the ordinary" and is justified in defending its commercial interests.

In particular, as concerns the "highly specific" context of the European pharmaceutical industry, he considered that a supply restriction in order to limit parallel trade can be objectively justified, as a reasonable and proportionate measure to protect the producers' legitimate commercial interests.

A.G. Jacobs stressed that his conclusions were limited to the pharmaceutical market only and were based on the following three considerations:

— First, price differentials which create opportunities for parallel trade are the result of the regulated nature of the European pharmaceutical market. Companies are justified in attempting to limit parallel trade because they are not seeking to entrench price differentials of their own making, but to avoid the negative consequences which would follow if very low prices in some Member States were generalised across the Community. A requirement to meet all orders would, in many cases, impose a disproportionate burden, especially given the moral and legal obligations incumbent on companies to maintain supplies in all Member States.

— Secondly, a requirement to supply would harm the incentive for dominant companies to innovate and invest in R&D, given the low returns which they could expect during the period of its patent protection.

99. [142].

1. [104], [123] and [142].

2. With thanks to Flavia Distefano and Elisabeth Arsenidou for their assistance.

3. Case C–53/03, *Syfait v Glaxosmithkline*, opinion of October 28, 2004; Press Release No.87/04, October 28, 2004.

— Thirdly, such parallel trade mainly benefited wholesalers rather than purchasers.

A.G. Jacobs also considered whether the Greek Commission could be considered as a "judicial body" under Art.234 EC, despite the fact that only two out of its nine members are lawyers,[4] so that a reference to the ECJ was admissible.

He concluded that the Commission could be considered as a "judicial body", because an authority charged with complex technical issues, such as competition law, is expected to have a lower proportion of members with pure legal background. He also noted that this is in line with Regulation 1/2003. A generous approach towards references by national competition authorities would provide an additional safeguard for the uniformity of Community law.

Clearly an important opinion! It will be interesting to see what the Court now rules.

Box 4

- Cartel cases
  - * *Greek Ferries:*
    - Can the Commission ask for increased fines for appeals of the facts?
  - * *Cement*
    - Company acquired after infringement not part of relevant turnover for fine.
  - * *Graphite Electrodes*
    - Very detailed review by CFI of the way the Commission applied the fining guidelines
    - Fine increases may be made in some cases (2 per cent here) (Time for a new rule?)
    - What does a company have to give in response to a request for information? Even notes of cartel meetings?!
  - * *Seamless steel tubes*
    - Voluntary restraint not legal protection, just politics
    - Fine increase discussed, but decrease in circumstances
  - * *German banks*
    - Weak evidence
    - Beware the fax!
  - * *Dutch electro-technical Fittings wholesalers*
    - Unilateral collective exclusive dealing agreement

Cartel cases

Greek Ferries

In December 2003, the CFI generally upheld the Commission's decision in the *Greek Ferries* cartel cases, while reducing the fines on two companies.[5]

It may be recalled that these cases involved alleged price-fixing and market-sharing between Italy and Greece. The markets concerned were small and there was argument about whether governmental involvement in the sector should be treated as sufficient to suggest that the companies had been instructed or otherwise pressured to enter into such agreements. The Commission rejected such defence claims, but reduced fines in part because it accepted that there may have been some uncertainty on the issue. As a result of these factors, the Commission treated a "very serious" infringement as a "serious" one and tailored the fines to the small market size.

The companies concerned still appealed. Several points are of interest.

First, the CFI found that one company, Ventouris, had been fined too much because the Commission had treated the infringement as a single continuous one whereas, in fact, the infringement should have been divided into two, one related to passenger services and another related to cargo services. Since Ventouris had only been involved in the cargo infringement, which only concerned a smaller market on specific routes and which was about one quarter of the passenger services market, its fine was reduced from €1.01 million to €252,000.[6] The fine on another company, Adriatica di Navigazione, was similarly reduced from €980,000 to €245,000.

Secondly, the companies contested the lawfulness of the Commission's investigation, insofar as the Commission had carried out a "dawn raid" on premises believed to belong to Minoan Lines, but which were in fact those of Minoan's agent, a company called the European Trust Agency ("ETA"). After a detailed review, the Court found that the Commission could validly investigate such third party premises since the Commission was entitled to treat them as the premises of Minoan. On the facts, the Court noted that ETA had been given the power to represent Minoan in the investigation and the premises were the real centre of Minoan's activities. The Court also found that ETA was operating as a single economic unit with Minoan.

Thirdly, insofar as on appeal some companies contested findings of fact related to the infringement, the Commission asked the CFI to remove the 20 per cent reduction of fines which had been granted in the Commission's proceedings for not contesting the facts and to increase the fines accordingly. The Court rejected this. The Court's view, echoing that taken in the *Stora* case, was that the companies could not be prevented from

4. The Court has already dealt in the past with references from national competition authorities, *e.g.* it admitted a reference by the Spanish Tribunal for the Defence of Competition in Case C–67/91, *Asociación Española de Banca Privada and Others* [1992] E.C.R. I-4785.

5. Cases T–56, T–59, T–61, T–65 and T–66/99, judgments of December 11, 2003.

6. Case T–59/99, *Ventouris v Commission* at [214]–[222].

exercising their appeal remedies normally under the Treaty. In particular, a company could not be criticised for disagreeing with the manner in which the Commission obtained documents and could also contest the manner in which the Commission appraised those documents as evidence of a cartel.[7] (This issue has come up also in *Graphite Electrodes*, described below.)

Finally, on the substance, the CFI predictably upheld the Commission's approach on governmental action. It is a difficult defence plea to make out, since the Court insists on clear evidence that conduct was *required* by governmental action.

Wholesalers of electro-technical fittings

In December 2004, the CFI dismissed two applications for annulment of the Commission's decision in the *Dutch electro-technical wholesalers fittings* cartel case.[8]

It may be recalled that CEF Holdings Ltd, a UK wholesale distributor for electro-technical fittings, faced difficulties entering the Dutch market and lodged a complaint with the Commission. After a somewhat protracted investigation, in October 1999 the Commission found that FEG, a Dutch association of wholesalers of electro-technical fittings, had infringed Art.81(1) EC by entering into a collective exclusive dealing arrangement intended to prevent supplies to non-members of the FEG. This arrangement had included an agreement with NAVEG, a Dutch association of "Exclusive (supplier) Representatives" in the electro-technical sector and concerted practices with suppliers not represented in NAVEG. Moreover, the Commission found that FEG had restricted the freedom of its members to determine selling prices individually. One company, Technische Unie ("TU") which was one of FEG's members, was also accused of taking active part in these infringements. The Commission imposed a fine of €4.4 million on FEG and €2.15 million on TU.

In January 2000, both TU and FEG appealed. The CFI upheld the Commission's finding that FEG had entered into a collective exclusive dealing arrangement aimed at preventing supplies to non-members of the FEG.

The infringement comprised (i) a gentlemen's agreement between FEG and NAVEG by which NAVEG undertook that it would advise its members not to sell electro-technical fittings to wholesalers not belonging to the FEG; and (ii) concerted practices whereby the FEG and its members sought to extend that agreement to certain suppliers not belonging to NAVEG. The exclusive dealing arrangement, however, was not reciprocal, meaning that FEG members were, in principle, free to purchase products from firms which were not party to the agreement.

On appeal, FEG argued that the "unilateral" collective exclusive dealing arrangement was "devoid of purpose" and that NAVEG members had no interest in concluding such an arrangement. However, the Court rejected this argument, pointing out that FEG had 96 per cent of the Dutch wholesale market for electro-technical fittings and still some 50 per cent if a broader market definition were taken, including direct distribution from suppliers to retailers. In short, FEG had purchasing power which could not be disregarded by NAVEG members.

As regards the concerted practices aimed at extending the exclusive dealing arrangement to undertakings not belonging to NAVEG, FEG denied that they could be attributed to it as an association, arguing that they should be attributed to its members. The Court rejected this as well, noting that the respective actions concerned the same object, shared the same beneficiaries and were implemented by the members and certain executives of the FEG. As a result, they should be deemed attributable to that association.

Finally, the applicants argued that the administrative procedure had been excessive in duration. Eight and a half years had passed from the complaint until the Commission eventually adopted its decision in 1999. It was argued that this was not a reasonable period for proceedings which are likely to lead to penalties.

However, the CFI rejected this also. Quoting A.G. Mischo in the *PVC II* case,[9] the CFI considered that it was necessary in considering the reasonableness of such an extended procedure to make a distinction between the investigative phase prior to the Statement of Objections and the rest of the administrative procedure.

In this context, the Court drew an analogy between criminal and competition law observing that, in criminal matters, the reasonableness of the time for a procedure referred to in Art.6(1) of the European Human Rights Convention ran from the time when a person is charged. Similarly, the CFI considered that the fact that a procedure was long up to the Statement of Objections, was not in itself capable of affecting the rights of defence.

Here the administrative procedure after the Statement of Objections had taken more than 39 months. The reasonableness of this had to be assessed by reference to the specific circumstances of the case. In this case, the Court concluded that the 16 months that had elapsed between the Statement of Objections and the Hearing of the parties were not excessive. However, the 23 months between the Hearing and the final decision exceeded the period which, in the normal course of events, would be needed for adoption of the decision. Since the

7. Case T–65/99, *Strintzis Lines v Commission*, at [27]–[30].
8. Joined Cases T–5/00 and T–6/00, judgment of the Court of December 16, 2003.

9. Opinion in Case C–250/99, *P Limburgse Vinyl Maatschappij*.

Commission had already reduced the fines in the case by €100,000 on both FEG and TV to deal with this, the appeal was rejected.

The CFI considered that the uncertainty and adverse effects on reputation involved in such proceedings were just inherent in Regulation 17 procedures.

With respect, this is a somewhat harsh and narrow approach. Practically, one can understand that procedures with new issues and multiple defendants can take time, but five years between complaint and Statement of Objections is not adequate, either for the Commission (with staff mobility every five years) or the parties. One may also question whether this issue is just about the rights of the defence. Should not this be a question of good administration, a principle which might sensibly be used to promote quicker procedures?

Cement

In January 2004, the ECJ gave judgment on the appeals brought by six companies from the CFI judgments in the cement cartel case.[10]

In November 1994, the Commission had imposed fines, totalling €248 million on companies and a trade association which had been involved in various anti-competitive practices on the grey and white cement markets. The Commission's long and detailed decision found, amongst other practices: agreements on non-transshipment between EU countries, specific agreements on market-sharing, and collective action to prevent exports of Greek cement to Italy, the United Kingdom and other countries.

In 2000, the CFI reduced the amount of the fines imposed by €140 million.[11] The Court found that (i) the Commission had not adequately proved participation by some companies in the cartel; (ii) some of these had participated for shorter periods of time than claimed by the Commission; and (iii) two of the companies had been deprived of evidence which might have aided their defence. In consequence their fines were annulled. In addition, the CFI found that the Statement of Objections had not indicated an intention to fine the trade association, so its fine was annulled.

The ECJ largely upheld the CFI's judgment.

First, in the case of *Ciments français*, the ECJ found that turnover of a Belgian subsidiary had been incorrectly included in calculating the applicable fine. This subsidiary had not come under the control of Ciments français until October 1990, *i.e.* after the infringement ended. The fine on Ciments français was reduced by just under €4 million to €9.6 million accordingly.[12]

Secondly, the ECJ confirmed the correctness of the CFI's approach on a number of procedural issues. Notably:

- The CFI had been correct not to annul the decision despite the Commission's acknowledgment that it had denied access to three quarters of the documents in its file.
- Before any such annulment it had to be shown that the lack of sufficient access to the file prevented access to documents which were likely to be of use in the companies' defence.[13]
- By ordering measures of organisation, allowing the parties to review the file to see if there were material documents, which they could have used in their defence, the CFI had also not attempted to replace the Commission in its investigative role. It had merely carried out a provisional examination of the evidence to assess whether there had been an infringement of the rights of the defence.[14]
- Furthermore, to justify a finding of a material error, the CFI had been correct to hold that it was necessary to determine an "objective link" between the documents withheld by the Commission and an objection contained in the decision.[15]
- The CFI was also correct in its view that the test for when lack of access to a document might justify annulment of the decision was whether, following disclosure, there would have been even a small chance of the outcome of the administrative procedure being altered.[16]

One senses that the ECJ, like the CFI, was not supportive of technical procedural challenges to this enormous decision in an enormous case.

Thirdly, the ECJ also found that an interested party is not entitled to be informed by the Commission if the latter drops certain objections (here in relation to certain conduct on the Italian market).[17] It is only necessary to inform a would-be addressee of such a decision if there would be a material alteration in the evidence relied on in a decision, or if new facts would be taken into account.[18]

Fourthly, the CFI was correct to reject Irish Cement's argument that it had a right to cross examine the authors of certain documents. The procedure before the Commission is purely administrative and there is no requirement that cross examination be permitted.[19]

10. Joined Cases C–204/00 and others, *Aalborg Portland*, judgment of January 7, 2004. With thanks to Cormac O'Daly for his assistance.
11. Joined Cases T–25/95, etc. *Cimentières CBR v Commission* [2000] E.C.R. II-491. See [2001] I.C.C.L.R. 13–15.
12. [381] to [385].
13. [101].
14. [102] to [106].
15. [126] to [129].
16. [131].
17. [188] to [196].
18. [192].
19. [200].

Graphite Electrodes

In April 2004, the CFI issued its judgment in various appeals against the Commission's *Graphite Electrodes* decision.[20] It may be recalled that this decision involved a worldwide price-fixing and market-sharing cartel for electric arc furnaces, which are mainly used to make steel.[21] Fines totalling some €220 million were imposed. Eight European, American and Japanese firms were involved. There were parallel proceedings in the United States and Canada.

There were seven appeals, leading to significant reductions of fines, essentially on the basis that the Commission has misapplied its own fining guidelines. In one case, the CFI also *increased* a fine, in the sense that it modified the reduction in fine which the Commission had given the company. Overall, the fines on the seven companies concerned were reduced from €207.2 million to €152.8 million.

The case is interesting for a number of points.

First, although the Court stated that the Commission has a large measure of discretion in fining, it stressed that the Commission must apply its own fining guidelines strictly. In particular, there should be respect for the principles of proportionality and equal treatment as between the cartel offenders. Interestingly, in this case the Court was also willing to look closely at the evidence which the Commission relied on for each element of the guidelines, in order to see if there were "manifest errors" in their application.

The result is that the CFI checked the Commission's positions in detail and, in several ways, disagreed with the Commission's findings, leading to significant reductions in almost all of the fines imposed. Thus, the largest fine was reduced from €80.2 million to €69.1 million and others were simply halved.[22] Amongst other things, the Court reviewed (and corrected) whether firms had been placed in the right "size categories" for the starting amount of fines; the amount of multiplier applied to a firm for deterrence; and the importance of the cooperation of companies to the Commission's case.

Secondly, the Court rejected the argument that fines and damages paid for the infringement outside the EEA should be taken into account in assessing EU fines. The Court held that such sanctions penalised infringements with impacts on different markets. However, the Court confirmed that fines or damages paid for infringements inside the EU are to be taken into account, since they apply to the same territory.[23] The Court also found that it was not unlawful for the Commission to consider worldwide turnover derived from sales of the relevant product in order to evaluate the economic capacity of the cartel members to harm competition in the EEA.[24]

Thirdly, the Court found that a company which cooperates through oral communications should be given credit for that cooperation under the leniency programme.[25] On the facts, UCAR had given information orally, which was later confirmed in written statements, but the Commission had not given UCAR credit for the oral information. The CFI said that was wrong because the information had been useful to the Commission's investigation.

Fourthly, the Court again had to deal with requests by the Commission to increase fines imposed where firms had challenged the findings of fact in the case on appeal, while receiving a reduction in the fine imposed for not contesting the facts.[26] The Commission asked for increases of at least 10 per cent.

The Court's approach here was more nuanced than in *Greek Ferries*. The Court stated:

- — If a firm has expressly, clearly and specifically acknowledged the facts, it is estopped, in principle, from disputing them on appeal.[27]
- — If a firm does not expressly acknowledge facts, the Commission must prove them and a company can put forward any plea in defence which it deems appropriate.
- — If the Commission's case is not clear and the firm concerned considers that the facts have been misinterpreted, it can raise such an issue on appeal. That was the case here since the Commission had relied on general conduct and no-contest statements, rather than specifics.
- — However, if a company does so, it may lose the 10 per cent reduction for co-operation or part of it, where the company has obliged the Commission to put forward further evidence, or to draft a defence on such an issue.
- — A company is also entitled to put "a fresh legal complexion" on documentary evidence previously submitted in the procedure.[28]

On the facts, this led to an increase of one fine by 2 per cent[29] (*i.e.* a reduction for non-contestation of the facts from 10 per cent to 8 per cent).

This has become undesirably complex. Perhaps it is inevitable because the fines are so high and their level turns on precise facts. However, one would think that a solution would be to give companies a "draft preliminary findings of fact"

20. Cases T–236/01 and others, *Tokai Carbon v Commission*, judgment of April 29, 2004.
21. [2002] I.C.C.L.R. 24.
22. [458].
23. [132]–[134], [138], [148] and [348].
24. [200].
25. [430]–[433].
26. [98] and [272].
27. [108]–[109].
28. [288].
29. [112]–[113]; [286]–[288] and [418].

document, before the formal Statement of Objections, so that they can check it and co-operate with the Commission in making sure that it has the facts right. At the moment, companies are faced with the Statement of Objections and know that if they "contest" it that may be perceived as a ground for denying them a 10 per cent reduction in fines. As a result, companies may not clarify particular points, which can lead to disputes later, when the companies realise that fines are much higher as a result.

Fifthly, the Court upheld appeals that companies should be given credit for providing answers to Commission requests for information, which went further than legally permitted. In other words, the CFI found that the Commission had asked companies not only purely factual questions and for existing documents, but also to describe what happened at meetings and for the results/conclusions and for protocols and other material disclosing the contents of meetings which the Commission suspected involved infringements.

Applying *Orkem* and *Mannesmannröhren-Werke*,[30] the Court held that such material did not have to be provided, since it involved admissions of the infringements concerned. By providing that information, the companies were therefore not acting pursuant to a legal obligation and were entitled to credit for their voluntary waiver of their defence rights.[31] The result is that the Commission had to give companies "co-operation credit" for answering requests for information which go beyond what the Commission was legally entitled to ask for. The Court also held that a company is not required to tell the Commission facts which will be used to increase its fine (*i.e.* here that it had warned another company of an investigation[32]). The Commission is appealing these points.

Finally, the Court confirmed that the Commission is not obliged to give a reduction for the financial difficulties facing the cartel participants (although it may choose to do so in its discretion, where appropriate). It is argued that many cartels arise because a sector is in difficulty and therefore such an obligation would require the Commission to give such a reduction in most cases.

Seamless Steel Tubes

In July 2004, the CFI gave judgment on appeals to the *Seamless Steel Tubes* decision.[33]

The Commission had found a market-sharing agreement between European and Japanese producers of seamless carbon-steel pipes and tubes, so-called "Oil Country Tubular Goods" ("OCTG") and "Line Pipes" used to transport oil and gas. This was called the "Europe-Japan Club". The Commission had fined the eight companies, with amounts totalling €99 million. Seven of the eight brought annulment actions which the CFI largely rejected. However, the fines were reduced by €13 million on two grounds.

First, it may be recalled that the Commission had taken into account the existence of voluntary export restraints and similar measures concluded between the Commission and Japan between 1972 and 1990 to conclude that fines should only be imposed from *the beginning* of 1990 onwards.[34] The parties claimed that the voluntary restraints continued until *the end* of 1990. Since the Commission was for some reason unable to produce evidence to the contrary from its archives, the CFI upheld the position of the companies.

In addition, in the case of the Japanese companies, the Commission was found not to have adequately proved that the infringement lasted beyond July 1, 1994, although it had claimed that the infringement ceased at the beginning of 1995. As a result, the period in respect of which the fine was calculated for the Japanese companies was reduced from five to three and a half years and the relevant period for the European companies was reduced by one year.

It should be noted also that the Commission did not treat the voluntary restraints as obliging it to reduce the fines concerned, particularly because the old 1972 Commission Notice on Imports from Japan stated that no comfort could be drawn from voluntary restraint agreements as regards the application of competition law. Rather, the reductions were viewed as political concessions.[35]

Secondly, the CFI reduced the Japanese companies' fines for breach of the principle of equal treatment. The European companies had committed an additional, separate infringement of Art.81 EC, but the Commission had not taken account of this in determining the amount of their fines.[36] In this respect, different situations had been treated identically. The CFI stated that the logical way to remedy this would have been to increase the fines payable by the European companies.[37] However, the Commission had not argued this point in its defence and had only raised it at the hearing.[38] Given that the European companies had therefore been unable to give their views on a possible increase in their fines, the CFI decided that it would

30. Case 374/87, *Orkem v Commission* [1989] E.C.R. 3283; Case T–112/98, *Mannesmannröhren-Werke v Commission* [2001] E.C.R. II-729.
31. [401]–[409] and [412].
32. [412].
33. Cases T–44/00, T–48/00, T–50/00 and Joined Cases T–67/00, T–68/00, T–71/00 and T–78/00, judgment of July 8, 2004. With thanks to Cormac O'Daly for his assistance.
34. [2004] I.C.C.L.R. 61.
35. See the Joined Cases judgment at [340]–[528] and [582]–[587].
36. [567] to [571].
37. [576].
38. [578].

be more appropriate to reduce the fines imposed on the Japanese companies.[39]

German Banks–Eurozone

In October 2004, the CFI annulled the Commission's decision concerning the alleged involvement of German banks in an agreement to fix the way of charging and the actual charge for converting currency into Euros in the transitional period before the Euro was introduced.[40]

The Commission had found such an agreement on the basis of two accounts of a meeting in 1997 between German banks, corroborated in its view by statements made at the Oral Hearing in the case and the banks' actual behaviour.

The Commission considered that there was (at least some) consensus that a percentage commission be used for such exchange and on a target commission of about 3 per cent (to achieve 90 per cent recovery of the income which banks made previously on currency exchange through currency buying and selling rate differentials).

The banks put forward alternative arguments. Notably, that there had been no actual agreement. In fact, the agreed communication to the German Bundesbank after the relevant meeting had stated that each bank would decide for itself the form to be taken by its future charging structure.

On the facts, the Court found for the applicant. All this occurred by way of a ruling on judgment in default since, owing to a faxing error, the Commission had not submitted its Defence in time. What the Court did therefore was to assess the applicant's arguments against those in the Commission's decision, but without the Defence. In such circumstances the Court did not consider the Commission's decision to be founded on sufficiently cogent evidence on the way charges were to be made or their amount.[41]

Other

In January 2004, the CFI reduced the fine imposed by the Commission on *JCB* from €39.6 million to €30 million.[42] It will be recalled that JCB produces construction site, earth moving and agricultural machinery/equipment.[43] The Court upheld two out of the five elements of the infringement which the Commission had found. Thus, the Court upheld Commission findings of restrictions on passive sales by JCB's distributors and restrictions on sources of supply on some dealers. However, the Court considered that there was not adequate evidence of other findings: that JCB fixed discounts or resale prices of its distributors in the United Kingdom and France; that JBC imposed service support fees on its UK distributors selling to other Member States, or that JCB withdrew trading support from agents in the United Kingdom in the case of sales outside the territory.

In April 2004, the ECJ dismissed *British Sugar*'s appeal against the CFI's judgment upholding the Commission's *British industrial and retail sugar* decision.[44] The Court upheld the CFI's assessment of effect on trade between Member States and rejected other challenges to the CFI's review of the fines imposed.[45]

In September 2004, the CFI also ruled that the International Olympic Committee's anti-doping regulations were not subject to EC Competition law, being purely sporting rules which do not pursue any economic objective.[46]

In Pt 2, to be published in Issue 3, the author will outline:

- Recent Commission cartel, co-operation and distribution cases, in areas such as national recycling schemes, airline alliances, financial services, and the distribution of Pokémon stickers.
- Various new proposed "commitment decisions" for the German *Bundesliga, Coca-Cola's* rebate system and *Repsol's* service stations in Spain.
- The Commission's Art.82 EC decision in *Microsoft.*
- Policy issues, such as a possible extension of in-house privilege.
- The Commission's recent drive to promote competition in the liberal profession with a decision involving *Belgian Architects*.

39. [579].
40. Case T–56/02 *Bayerische Hypo- und Vereinsbank v Commission*, judgment of October 14, 2004. The other cases are T–44/02, T–54/02, T–60/02 and T–61/02.
41. For related previous proceedings see [2004] I.C.C.L.R. 59 and [2003] I.C.C.L.R. 62.
42. Case T–67/01, judgment of January 13, 2004.
43. See [2002] I.C.C.L.R. 63.
44. See [1999] I.C.C.L.R. 11.
45. Case C–359/01P, judgment of April 29, 2004.
46. *Meca-Medina and Majcen v Commission*; Press Release No.71/2004, judgment of September 30, 2004.

Major Events and Policy Issues in EC Competition Law, 2003–2004 (Part 2)

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This paper is the second and final part of the overview of "Major Events and Policy Issues in EC Competition law in 2004", following from last month's journal.[1] This part of the paper is divided into three sections:

(1) Recent Commission decisions on cartels, co-operation, distribution and abuse of dominant position, including notably the *Microsoft* decision;
(2) an outline of current policy issues, including possible extension of in-house privilege and possible Art.82 EC guidelines;
(3) a survey of some areas of particular interest. Notably, the Commission's recent drive to promote competition in the liberal professions with a decision involving *Belgian Architects*; recent energy cases; and the Commission's decision on the sale of UEFA's football media rights.

Commission Decisions

Cartels (see Table 1)

There has not been quite the same level of fining decisions this year as last. Two "old" decisions which have been published this year merit some comment: *Austrian Banks* and *Methylglucamine*. Otherwise, there have been eight decisions announced, ranging in sector from copper tubes supply to architects' services and tobacco purchasing. It is proposed to outline the new cases first and then point out some aspects of the "old" decisions. The *Belgian architects* case is discussed in the section on areas of particular interest below, together with the Commission's recent action on competition and the liberal professions.

It may be useful to note at the outset there is now no "cartel unit" as such. Rather, enforcement of Art.81 EC, including cartels, has been reorganised on an industry basis within DG COMP (as was the case some years ago).

The Commission also now publishes (i) press releases; (ii) short case summaries (in the EC Official Journal); and (iii) full decisions in the language of the case and the official Commission languages on its website. This appears to be a result of the new Enlargement, bringing yet more languages into the EU.

Those concerned with worldwide cartels should also be aware that the US rules have changed to allow an amnesty applicant to limit its exposure to single instead of treble damages under certain conditions.[2]

Table 1

	Total Fines	**Highest fines(s)**
Carbon and graphite products:	€101	Carbone Lorraine was fined €43.05
Organic peroxides:	€70	Atofina was fined €43.47
Industrial tubes:	€79	KME Group companies fined a total of €39.81
Belgian architects:	€0.1	
Copper plumbing tubes:	€222.3	KME Group companies fined a total of €67.08
French beer:	€2.5	Danone €1.5
Spanish raw tobacco:	€20	Deltafina €11.88
Needles and haberdashery:	€60	Coats and Prym €30 each
	€554.9	**(All figures are € million)**

N.B. — Credit for evidentiary contribution outside leniency (2002 Notice principle applied in 1996 Notice cases also).
— Issue of responses to requests for information in *Austrian Banks* decision also.
— "Treuhand" consultant firm fined in *Organic Peroxides.*

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1. [2005] I.C.C.L.R. 47

2. See, Wilmer Cutler Pickering Hale and Dorr Antitrust and Competition Law Update, June 2004 available at *wilmerhale.com.*

Carbon and graphite products

In December 2003, the Commission imposed fines of some €101 million on five companies for operating a cartel in the market for electrical and mechanical carbon and graphite products. Electrical carbon and graphite products are used mainly to transfer electricity to and in electrical motors.[3] Mechanical carbon and graphite products are used to seal gases and liquids in vessels and to keep low-wear parts in machines lubricated.

The EEA-wide market for such products was found to be worth some €291 million in 1998, the last year of the infringement (interestingly, here the Commission identified the market as *including* the value of *captive* use). The infringement was treated as "very serious".

The cartel operated between October 1988 and December 1999. During this period the companies, which were found to control 93 per cent of the European market, held more than 140 meetings to decide price increases for a broad range of products, as well as for large individual customers.

Although during the same period some of the companies were participating in two other cartels, graphite electrodes and speciality graphite, which have also been found and punished, the fines imposed were not increased for this, because the collusive behaviour was broadly contemporaneous.

The Commission reduced the fine that would otherwise have been imposed on SGL by 33 per cent, because it had already imposed high fines on SGL in the previous two cartels and because the undertaking was in a difficult financial situation (although the Commission did not otherwise accept SGL's submission on inability to pay).

The fines, after reductions for co-operation in most cases, ranged from €43 million on Le Carbone Lorraine to €1 million on Conradty Nürnberg, with Morgan Crucible receiving full immunity for having been the first company to report the cartel to the Commission.

Organic peroxides

In December 2003, the Commission imposed fines of nearly €70 million on five companies for operating a cartel in the market for organic peroxides, chemicals used in the plastic and rubber industries.[4]

The Commission found that the cartel operated between 1971 and the end of 1999. With a total duration of 29 years, this made it the longest-lasting cartel with which the Commission has dealt so far. The cartel involved price-fixing and market-sharing in an EEA market worth some €250 million a year. The Commission found this to be a "very serious" infringement. The fines ranged from €43.47 million on Atofina to €1,000 on AC Treuhand, a Swiss consultancy company involved in the cartel administration.

The fines for Atofina, Laporte (now Degussa UK Holdings) and Peroxid Chemie were increased significantly for recidivism. Akzo was given full immunity (under the 1996 Leniency Notice) because it was the first to approach the Commission in early 2000 with decisive information on the cartel.

The decision to fine AC Treuhand is interesting, because normally such third-party service providers have not been penalised. Here, AC Treuhand is reported to have organised meetings, produced market share papers and reimbursed the travel expenses of participants to avoid leaving traces of illegal meetings, suggesting that its involvement went unusually far.

Industrial tubes

In December 2003, the Commission imposed fines totalling some €79 million on three companies for operating a cartel in relation to the supply of industrial copper tubes for air-conditioning and refrigeration.[5] The cartel was found to have involved allocation of markets and the setting of price targets and increases and other commercial terms in the framework of the Cuproclima Quality Association.

The cartel was operated between May 1988 and March 2001 in a market that the Commission estimated to be worth €290 million in 2000 (although the companies argue that much of that was just the cost of metal, which was not part of their unlawful co-operation, since its price was established on the London Metal Exchange).

The fines, after reductions for co-operation, ranged from €39.8 million on the companies now in the KME group to €18 million on Outokumpu. Outokumpu's fine was increased for recidivism, relying controversially on a decision under the ECSC Treaty related to stainless steel cold-rolled products. This is the subject of an appeal (as is the metal turnover aspect of the decision).

Mueller Industries was given full immunity for having approached and co-operated with the Commission first.

Interestingly in the case, which came under the 1996 Leniency Notice, the Commission also applied the principle in the later 2002 Leniency Notice, whereby a company's fine may be reduced for a specific evidentiary contribution. Here, in addition to 50 per cent for leniency co-operation, Outokumpu's fine was reduced some further 20 per cent for evidence disclosing the full duration of the infringement.

Copper plumbing tubes

In September 2004, the Commission imposed fines totalling some €222.3 million on some eight groups

3. IP/03/1651, December 3, 2003; O.J. L125/45, April 28, 2004 (summary).
4. IP/03/1700, December 10, 2003.
5. IP/03/1746, December 16, 2003.

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of companies for operating a cartel in the European market for copper water, heating and gas tubes.[6] The cartel was found to have operated between June 1988 and March 2001, in a market which the Commission estimated to be worth some €1.15 billion in 2000. This was a similar infringement to that involving industrial tubes and was contemporaneous with it, this time revolving around a quality mark called SANCO.

Fines, after leniency, ranged from €67 million on the companies now in the KME group to €9 million on Halcor. Again Mueller Industries was granted full immunity for having approached the Commission first. Outokumpu's fine was again increased for recidivism, based on the earlier ECSC infringement.

French beer

In September 2004, the Commission also imposed small fines totalling €2.5 million on the two main brewery groups in France: Danone/Brasseries Kronenbourg S.A. and Heineken N.V., for having agreed to "balance" the "Horeca" markets between the two groups.[7]

It appears that a so-called "armistice" agreement was entered into by the parties in 1996, after an "acquisition war" during which each group had been buying up drinks wholesalers, leading to an inflation in the acquisition costs of such wholesalers.

The companies are reported to have agreed to bring an end to such rising costs and to "balance" their integrated distribution networks. This meant that they agreed (a) to a temporary acquisition stop; (b) to the "balancing" of the *total volume of beer* distributed through the integrated network of each party; and (c) to the "balancing" of the volume of beer *brands* distributed by each party on behalf of the other.

In setting the low fine, the Commission considered the infringement "serious" but took into account that the agreement was never implemented. However, the fine on Danone/Brasseries Kronenbourg was increased for recidivism (after the Belgian beer case).

Spanish raw tobacco

In October 2004, the Commission imposed fines totalling €20 million on five companies involved in raw tobacco processing in Spain, together with smaller fines of €1,000 on several tobacco growers' associations.[8]

The processing companies were found to have colluded on prices paid to and the quantities bought from tobacco growers in Spain. In other words, this involved a *purchasing* cartel, rather than a sales cartel. However, the tobacco *growers* were found to have engaged in collective price negotiations on their side also. They agreed on price ranges and minimum prices for negotiation of "cultivation contracts" with processors.

The infringements took place between 1996 and 2001 and were considered to be "very serious" breaches in a market of relatively limited size (€25 million per year). Deltafina, a company active also in Italy, was fined €11.8 million. The practices appear to have been influenced by the agricultural regulatory context, although the Commission states that the conduct "cannot be imputed" to the Common Market Organisation for Raw Tobacco. It is a little surprising to see a statement in the press release that this was "very serious", given the limited national scope and size of market.

Needles and haberdashery

In October 2004, the Commission announced that it had fined two companies, Coats Holdings and William Prym, €30 million each for operating a cartel in the needle market and for segmenting the European market for haberdashery products (needles, pins, buttons, fasteners and zips) between September 1994 and the end of 1999.[9] A third company, Entaco Group Ltd, received full immunity for disclosing the cartel to the Commission. The Commission states that Coats, one of the main distributors of such products in Europe, forced Entaco to enter into market-sharing with Prym at manufacturing level in exchange for protection of its own private label brand "Milward". This was found to be a "very serious" infringement, in a European market worth €1 billion in 2003. However, the cartel is said to have had limited impact.

Methylglucamine

The Commission published its decision in relation to methylglucamine in February 2004.[10] It may be recalled that the case related to a price-fixing and customer allocation agreement between Rhône-Poulenc Biochimie RPB (part of Aventis Pharma) and Merck, found to have operated between 1990 and 1999.

Methylglucamine is a product which is mixed with others to create a "contrast" agent used in x-rays in medical applications. The market in question is quite small, some €3.1 million per year (at least this was so in 1999).

The Commission granted Merck a 100 per cent reduction for coming forward first and co-operating under the 1996 Leniency Notice. RPB/Aventis were fined €2.85 million after a 40 per cent reduction for co-operation.

6. IP/04/1065, September 3, 2004.
7. IP/04/1153, September 29, 2004.
8. IP/04/1256, October 20, 2004.
9. IP/04/1313, October 26, 2004.
10. O.J. L38/18, February 10, 2004. (The decision itself was taken in November 2002, see [2004] I.C.C.L.R. 55.)

On the decision, it appears that the Commission relied much on Merck's explanations and admissions from both companies. The Commission suggests that there were a series of price increases by the two companies, generally after annual meetings to review the last year's performance. There was some debate about when the cartel ended and therefore who had been responsible for the termination. Ultimately, the Commission could not decide the issue and therefore took the last day for validity of clearly agreed prices as the end. Again, the Commission noted that proving the extent to which prices differed as a result of a cartel is extremely difficult, given the various factors which may apply.[11]

On fines, while finding the infringement "very serious", the Commission reduced the basic amounts considerably (to €2.5 million for each company) because of the limited size of the product market. The Commission *increased* the fine by 100 per cent on Merck on the basis of deterrence (academically because of the immunity granted), taking the view that the addressees on the Aventis side were in fact smaller than Merck (even though the Aventis group itself was much bigger). There appears to have been no increase for recidivism, even though Rhône-Poulenc had infringed before. There was a 90 per cent increase for duration.

Aventis also sought mitigation of its fine for having adopted a compliance programme. Unlike the position some years ago, this was rejected by the Commission. These days the credit given appears only to be for *results* leading to termination and/or leniency applications![12]

Austrian banks

The Commission published its decision in the "Lombard Club" banking case in February 2004.[13] It may be recalled that this was a decision relating to an extensive, widely-known structure of committees which had operated in Austria for many years.[14] The Commission fined eight banks some €124 million in June 2002. Various aspects of the decision are interesting.

First, originally the co-ordination arrangements concerned had been endorsed in law, apparently in part because there was concern that there were poor levels of profitability amongst the many banks in Austria. There is also debate as to the extent to which the authorities continued to be involved informally, with the Commission noting that certain committees "quite central to this network were not *as a rule* attended by the Austrian National Bank" (emphasis added).[15]

Secondly, the arrangements concerned agreements on various issues, notably interest rates for lending and deposits, and advertising measures. In particular, the Commission found that on occasion the banks would react in concert to a reduction in the National Bank's key lending rates by lowering deposit rates, without at the same time lowering lending rates.

Thirdly, the Commission found that there was a structure of committees dealing with different issues, with systems for higher level discussion and ultimately a group at the top called the "Lombard Club". The Commission also found that certain banks represented not only themselves in such committees, but also certain sectoral groupings (*e.g.* savings banks).

Fourthly, the Commission discussed in its decision a period from 1994 to 1998. However, Austria only joined the EU from 1995. Since the Commission's right to intervene was not clear for 1994 (it was argued that only the EFTA Surveillance Authority was competent) as regards activities in the EEA, the Commission did not find an infringement for that year.[16]

Fifthly, there is extensive treatment of the issue of effect on trade: the banks arguing, on *Bagnasco* and the *Dutch Banks cases*, that the effects were limited to Austria; the Commission arguing that such a comprehensive arrangement clearly affected trade.[17] In addition, the Commission also set out specific examples of the ways in which it considers trade was affected, some appearing more directly relevant than others. Thus, the Commission referred to cross-border payment transactions and foreign banks seeking to enter the Austrian market. However, the Commission also suggested that there was indirect impact on investment and production decisions of subsidiaries of foreign firms and Austrian firms in Austria, and that the ability of individuals to purchase imported consumer durables such as cars from other countries might be affected.

Sixthly, the Commission's approach to fining is unusual. The Commission selected a number of the larger banks, found to have played a more important role and, as noted, in some cases to have represented certain banking sectors. Fines were *only* imposed on these selected banks and appear to have been increased on those with such "representative" roles.[18] The infringement was also treated as "very serious" because of its "comprehensive and institutionalised" nature and the relevance of banking services to the whole economy.[19]

Seventhly, there is extensive discussion about the duty of companies to reply to requests for information and the related issue as to whether, if they give more than they have to, they should

11. See para.231.
12. See para.260.
13. O.J. L56/1, February 25, 2004.
14. See, [2003] I.C.C.L.R. at p.62.
15. See para.496.
16. See para.406.
17. See para.445 *et seq.*
18. See paras 516–519 and 538.
19. See paras 506–507.

receive "co-operation credit" for so doing. As in *Graphite Electrodes*, the Commission considered that the banks were required to give the material facts of their involvement in meetings, and existing documents. (The Commission stated that here it relied entirely on pre-existing documents.) The banks argued that, insofar as this involves direct admissions, they do not have to answer such requests and, if they do, it is a voluntary act deserving a reduction in fine.[20] The Commission also rejected claims that a "joint exposition of the facts" had clarified the case, arguing that it was more of a defence document. In the end, the Commission only reduced the fines by 10 per cent, because the banks did not contest the facts set out in the Statement of Objections.

Co-operation

Table 2

— *Co-operation*
  * Austrian *ARA/ARGEV*
    - Local collector exclusivity allowed, if public tendering.
  * *Air France Alitalia*
    - Competitors required on key routes!
  * "SOs" for *Cartes Bancaires* and *VISA*.
    - NB. GCB notification had "lapsed".

— *Distribution*
  * Small fine on Topps for blocking parallel trade in *Pokémon* stickers.
  * Proposed commitment decision for *Repsol* service station settlement.
    - Considerable market opening proposed.
    - N.B. Cumulative network effect and high market share.

Horizontal co-operation

There have been few full Commission decisions this year on horizontal co-operation. However, the Commission has published its decisions on the *German Network Sharing Agreement* between O_2 and T-Mobile[21] and the *Reims II* postal co-operation case.[22] These have been outlined before.[23]

National recycling schemes

The Commission has also published its decision clearing the Austrian "ARA" system for collection and recovery of packaging waste.[24] This system is operated by *ARA* ("Altstoff Recycling Austria") with various other companies. It may be recalled that in 2002, the Commission had published a rather complex Art.19(3) Notice indicating that it planned to grant negative clearance or exemption "possibly with conditions" to the Austrian system.[25]

Companies active in transport and sales packaging, which are obliged by Austrian law to take back any packaging they put into circulation and provide for a suitable disposal, can adhere to ARA, which is the main system for collection and recovery of packaging waste in Austria. They have to pay a "licence fee" and thereby also acquire the right to fix the "Green Dot" mark to their packaging. ARA has entered into "waste disposal contracts" with eight sectoral undertakings (called "branch" recycling companies, "BRGs") covering all sorts of packaging material for the entire Austrian territory. Each of these BRGs organises the collection and/or recycling of a specific type of packaging material (*e.g.* metal packaging, wood and ceramics, plastic and textile fibres, paper and cardboard, and glass). The BRGs do not carry out all of these tasks themselves, but contract with sectoral recycling companies and regional collection and sorting partners.

Various undertakings were given to ensure that the "Green Dot" system does not prevent free movement of goods[26] (as in other cases). Otherwise, in its 2002 Notice, the Commission had appeared concerned to promote *competition at the regional collection level*, by giving collectors, which are currently outside the ARA system, sufficient opportunity to compete for ARA business (under the ARA system there is just one regional partner *per* collection region).

Subsequently, in its 2003 decision, the Commission found that the exclusivity clauses binding BRGs to one collector (but not also the collectors to BRGs) *per* region for a five-year period infringed Art.81(1) EC, because they hindered market entry by other domestic and foreign collectors, which were not participating in the ARA system.

The Commission granted an Art.81(3) EC exemption, after finding that the existing network effects created by engaging only one collector per region lead to efficiency gains through economies of scale and scope.[27] Furthermore, it estimated that the relevant cost savings would be passed on to consumers on the market for the packaged products. It considered that three-year exclusivity could be accepted to allow the recycling companies to recover the substantial investments necessary to build up the collection infrastructure, while it was guaranteed that, after five years at the latest, new contracts would be awarded *via tendering* in a competitive, transparent and objective procedure.[28]

20. See paras 485 *et seq.* and paras 544 *et seq.*
21. O.J. L75/32, March 12, 2004.
22. O.J. L56/76, February 24, 2004. See, Gabathuler and Sauter, *EC Commission Competition Policy Newsletter*, Autumn 2003, p.43.
23. See, [2004] I.C.C.L.R. at p.61 and p.63.
24. O.J. L75/59, March 12, 2004.
25. O.J. C252/2, October 19, 2002, [2003] I.C.C.L.R. 88.
26. See para.139.
27. See paras 160, 270, 272.
28. See paras 139, 277.

Interestingly, therefore, the Commission is accepting competition *by tender* for disposal area contracts at the latest every five years as sufficient residual competition for the fourth requirement of Art.81(3) EC,[29] acknowledging that it would be almost impossible in practice and in economic terms to duplicate collection infrastructure in the household sector across the whole of Austria.

The Commission granted an exemption from June 20, 1994 to December 31, 2006, on condition that BRGs in the ARA system would not hinder the *shared use* of collection facilities. Further, that the BRGs in the ARA system could only require disposal firms to provide evidence of packaging quantities corresponding to ARA's share of the total packaging licensed by recovery systems (the BRGs contested these obligations as impractical and unreasonable).[30] These obligations were considered necessary to safeguard access to the disposal infrastructure and, accordingly, competition on the market for collection and recovery of packaging waste.[31]

The exemption does not apply to ARA's charges system and any possible related cross-subsidising issue. The focus is rather on the underlying "macro" structure of such waste collection systems. The Commission also expressly noted that the decision is without prejudice to the application of Art.82 EC.

Air transport

In December 2003, the Commission cleared the alliance between *British Airways, Iberia and GB Airways*, a franchisee of British Airways.[32] The agreement, which was notified in July 2002 under Regulation 3975/87 enables the parties to co-operate in terms of pricing, scheduling and capacity. It was cleared after certain Commission concerns were met. Notably, the parties agreed to give up enough slots to enable one competitor to operate four daily services between London Gatwick and Madrid, and one further daily service between London Gatwick and Bilbao. The parties also undertook to surrender sufficient slots for one daily service out of Gatwick to Seville and for another to Valencia, if and when the number of business passengers increases to a defined level.

In December 2003, the Commission also published information on remedies proposed by *Air France and Alitalia* for their bilateral alliance.[33] Then, in April 2004, the Commission announced a decision clearing the alliance agreement between Air France and Alitalia.[34]

The two companies entered into a co-operation agreement in 2001, with the aim of creating a European "multi-hub system" based on their main airports of Paris Charles de Gaulle, Rome Fiumicino, and Milan Malpensa. The agreements involve, amongst other things, agreements on prices and the sharing of earnings on routes between France and Italy (and general network co-operation on pricing, scheduling and capacity). The companies notified the agreement to the Commission in November 2001 for exemption.

In general, the Commission was favourable (as in other recent alliance cases), recognising that consolidation is required in the European airline sector, that the two airlines had mainly complementary networks, that the alliance agreement improved connectivity, and that the co-operation created cost savings and synergies for the parties. However, as in other cases, the Commission has structural concerns over overlapping route services. Thus, the Commission identified seven routes where the combination of Air France and Alitalia would eliminate or significantly reduce competition (Paris-Milan, Paris-Rome, Paris-Venice, Paris-Florence, Paris-Bologna, Paris-Naples and Milan-Lyon) because, prior to the alliance, the two companies were the main competitors on these routes. After discussions, the two airlines agreed to mechanisms to "surrender" up to 42 pairs of slots *per* day, which would allow some 21 return flights.

The idea was that a new entrant would apply for slots under the existing IATA slot allocation system. If it cannot obtain them, then a new entrant can turn to the parties and seek slots, which the parties agreed to make available up to certain limits, at certain times and under conditions. The Commission will also be involved in the process, notably in assessing whether the new entrant is a sufficiently viable long-term competitor. The parties also agreed not to add new frequencies on a route where there was a new entrant for two years (save in exceptional circumstances).

Otherwise, the parties agreed to enter into interlining agreements with a new entrant, to "host" the new entrant in their frequent flyer programmes if required, and also agreed to enter into inter-modal passenger agreements at the request of rail or other surface or sea transport companies, to widen transport choices.

In announcing its decision, the Commission stated that, in practice, Air France and Alitalia might not have to surrender as many slots as foreseen, because slots had become available through the bankruptcies of airlines holding slots at Orly. Companies such as Volare, Easyjet and Meridiana were therefore offering services. However, the Commission added that if any actual competitor were to exit the market, Air France and Alitalia would have to make its slots available to other rivals in order to restore the level of competition sought by this decision.

29. See paras 278 *et seq.*
30. See paras 288 *et seq.*
31. See paras 288 *et seq.*
32. IP/03/1703, December 10, 2003.
33. IP/03/1676, December 9, 2003; O.J. C297/10, December 9, 2003.
34. IP/04/469, April 7, 2004.

As with the *Austrian Airlines/Lufthansa* decision, it appears therefore that the Commission is taking the ongoing maintenance of competition seriously in its remedies in this sector. The clearance was granted for six years from November 12, 2001.

Credit card systems

In July 2004, the Commission sent a Statement of Objections to nine major banks and to the French *Groupement des Cartes Bancaires* "GCB".[35] The objections relate to an alleged agreement on bank payment cards by means of which the banks, with the help of Groupement des Cartes Bancaires, are alleged to have shared out the market for the issue of CB cards in France in order to restrict competition from new entrants, such as banking arms of large retailers and medium-sized banks.

At the end of 2002, GCB, an economic interest grouping under French law comprising some 155 banks, notified the Commission on behalf of its members of the introduction of new, higher, complex charges payable to GCB by banks issuing CB cards.

The Commission appears to have formed the view that the notified agreements stemmed from a secret agreement to foreclose the market to new entrants and stated that it found evidence thereof, during inspections in May 2003 on the premises of GCB and of certain banks.

It is alleged that the tariffs adopted by GCB raised new entrance charges for CB cards and forced them to scale down their card-issuing projects considerably. Interestingly, the Commission specifically suggests that the agreement increased their costs by up to €23 per card and per year, and that this charge was passed on to consumers. Moreover, it is alleged that the banks party to the agreement were spared the new charges, and benefited from them, since the charges paid by new entrants accrued to them.

This appears to be an interesting "Regulation 1/2003 development" since, from May 1, 2004, presumably GCB's notification expired and it therefore no longer has immunity from fines. It will be interesting to see whether the case develops further or the banks adequately explain what was going on.

In August 2004, the Commission also sent VISA a Statement of Objections[36] concerning a rule in the Visa International by-laws according to which the VISA International Board shall not accept for membership any applicant deemed by the Board to be a competitor of VISA. The Commission was concerned that this rule has not been applied in an objective and non-discriminatory manner *vis-à-vis* all applicants for VISA membership. Notably, it appears that in April 2000 Morgan Stanley Dean Witter complained that it was denied VISA membership, apparently because it operates the "Discover" brand credit card, while others, such as Citigroup (which owns Diners Club), some Japanese banks (which are shareholders in the JCB system) and Cetelem (which operates the Aurora payment card network) are allowed. The Commission also notes that Mastercard does not operate a similar rule. There have been investigations on similar issues before.[37]

According to the Commission's preliminary assessment, this VISA rule implies that potential entrants would not be able to operate on the VISA network *anywhere* in the EEA, restricting competition for merchant acquiring. In addition, being refused VISA membership is thought to prevent potential new entrants from engaging in *cross-border* acquiring.[38]

Collective licensing of music copyrights

On May 3, 2004, the Commission sent a Statement of Objections to 16 organisations which collect royalties on behalf of music authors, stating that their co-operation agreement (known as the "Santiago Agreement") was potentially contrary to the EC competition rules.[39]

The Commission stated that the cross-licensing arrangements which the collecting societies have between themselves lead to an effective lock-up of national territories, transposing into the internet the national monopolies which the societies traditionally have held otherwise. The Santiago Agreement was notified in April 2001. Then, it was stated that the purpose of the agreement is to allow each of the participating societies to grant to online commercial users "one-stop-shop" copyright licences, which include the music repertoires of all societies and which are valid in all their territories.

While supportive of that purpose, the Commission considered that the structure put in place by the parties results in commercial users being limited in their choice to the monopolistic collecting society established in their own Member State. The Commission considered that the developments in online activities should be accompanied by an increasing freedom of choice by consumers and commercial users throughout Europe as regards their service providers. Notably, the Commission considered that the *territorial exclusivity* afforded by the Santiago Agreement to each of the participating societies was not justified by technical reasons

35. IP/04/876, July 8, 2004.
36. IP/04/1016, August 3, 2004.
37. See [1997] I.C.C.L.R. 41.
38. In May 2004, the Commission also issued a Press Release welcoming VISA and Mastercard's decisions to publish their multilateral interchange fee rates for European cross-border payments on their respective websites, after discussions with the Commission on the issue. It appears that retailers have been complaining that banks are reluctant to give them the information. IP/04/616, May 7, 2004.
39. IP/04/586, May 3, 2004.

and is irreconcilable with the worldwide reach of the internet. It also noted that territorial exclusivity was not required in the *IFPI Simulcasting Agreement* which the Commission exempted in 2002.[40]

The date of this Statement of Objections suggests that this is another "Regulation 1/2003 development" since the societies' notification has now lapsed.[41] Again, this is only a preliminary phase and we will have to see how the societies justify the territorial provisions in the circumstances.

Telenor Canal+

In January 2004, the Commission announced in a short press release that it exempted for five years certain exclusive distribution agreements between Telenor and Canal+ Nordic, under which Telenor will have the exclusive right to distribute Canal+ Nordic's premium pay-TV channels in the Nordic region through its satellite television platform Canal Digital.[42]

The agreements were concluded in 2001, in order to guarantee continuity of pay-TV service after Telenor acquired the remaining 50 per cent shareholding in Canal Digital from Canal+ Nordic. Previously Canal Digital was a joint venture between Canal+ Nordic and Telenor. The agreements as initially notified included a long-term exclusivity, which the Commission considered anticompetitive. The Commission stated that it decided to exempt the co-operation after the parties agreed to limit the exclusivity to a shorter period. The Commission noted the presence of a second satellite pay-TV distributor in the Nordic region, MTG/Viasat, and that consumers would have available two distinct pay-TV brands at competitive prices.

Distribution

Porsche

In May 2004, the Commission cleared *Porsche's new distribution and after-sales network*, after Porsche committed to revise its agreements so as to comply with the new Motor Vehicle Block Exemption ("MVBE").[43] Porsche has opted for a selective distribution system, as have almost all the other car manufacturers.

As regards Porsche's *distribution network*, dealers are now free to provide after-sales services directly, or to sub-contract them to an authorised Porsche service centre.

The Commission found that the network is "*de minimis*", as Porsche's market shares in the relevant markets for car distribution are below five per cent in each EU Member State. As a result, Porsche is allowed to include certain restrictive clauses listed in Art.5 of the MVBE, as not appreciable in the specific circumstances and outside Art.81(1) EC.[44] In particular, Porsche is allowed to impose a "non-compete" clause requiring dealers to sell competing car brands through separate showrooms and sales personnel, as well as to prohibit dealers from opening secondary outlets even beyond October 1, 2005 (when such "location clauses" generally will not be capable of exemption under the MVBE).

As concerns its *after-sales network*, Porsche could only opt for a *qualitative selective* system, as it has more than 30 per cent of the Porsche car repair market. Based on this system, the Porsche official network is now open to any independent repairers who fulfil the required *qualitative* criteria.

However, Porsche service centres are not allowed to sell competing brands of sports cars and sport utility vehicles, such as Aston Martin, Audi, BMW, Jaguar, Lamborghini, Land Rover, Mercedes or Volkswagen (Touareg). The Commission authorised this non-compete clause, as it found that it only affects some eight per cent of operators in the car business and therefore the Commission considered that it was not an appreciable restriction on the market for the repair of Porsche cars. Moreover, the restriction did not apply to Porsche dealers who may also have a repair workshop or to independent or authorised car repairers.

Pokémon stickers and cards

In May 2004, the Commission fined Topps, a group of companies which produce *Pokémon stickers and cards*, some €1.6 million for seeking to prevent imports from low-price to high-price countries for cards and sweets bearing the image of Pokémon cartoon characters.[45]

The Commission has found that Topps entered into a series of agreements and/or concerted practices with several of its distributors in the United Kingdom, Italy, Finland, Germany, France and Spain with the objective of preventing parallel imports. It appears that in 2000, Topps charged its distributors up to 243 per cent more in Finland than in Portugal. The EEA market was estimated to be worth €600 million in 2000. Distributors which would not trace back parallel imports and monitor

40. O.J. L107/58, April 30, 2003 and [2003] I.C.C.L.R. 89.
41. In November 2003, the Commission also published a notice inviting comments concerning the *Cannes Extension Agreement* on the administration of phonomechanical rights in Europe, O.J. C282/14, November 25, 2003.
42. IP/04/2, January 5, 2004, see also [2004] I.C.C.L.R. 61 and Nehl *EC Commission Competition Policy Newsletter*, Summer 2004 at p.56.
43. IP/04/585, May 3, 2004. With thanks to Flavia Distefano for her assistance.
44. See the Explanatory Brochure to the MVBE ("Distribution and Servicing of Motor Vehicles in the European Union") of July 2002, Commission response to Question 7, at p.23.
45. IP/04/682, May 26, 2004.

the final destination of the products were threatened with supply cuts.

The Commission states that it set the overall fine at (only) some €1.6 million, taking into consideration the short duration of the infringement and the fact that it was terminated immediately after receipt of a warning.

Repsol

In October 2004, the Commission published an "*Art.27(4)*" Notice in relation to Repsol's motor fuel distribution practices through service stations situated in Spain.[46] This is another "Regulation 1/2003 development", insofar as it is a notice indicating that, subject to market testing, the Commission is planning to take a decision declaring commitments binding under Art.9 of Regulation 1 and inviting comments on such proposed action.

After notification of agreements and model contracts by Repsol in December 2001, the Commission found in March 2002 that Repsol's distribution practices involving non-compete clauses for the party to the agreement which operates at the lowest level of the distribution chain, could fall within the scope of Regulation 17 and invited interested parties to submit their possible observations.[47] Then, in June 2004, the Commission decided to initiate proceedings with a view to adopting a decision pursuant to Art.9 of Regulation 1/2003.

The notified agreements concern the exclusive purchase of fuel by service station operators in Spain and are of eight different categories depending on the type of tenure of the service station and on the nature of the commercial relationship between Repsol and the service station operator. Repsol was found to have market shares ranging between 35 per cent and 50 per cent on the fuel *wholesale* markets for petrol and diesel in Spain, and similar shares on downstream market for retailing of fuel in Spain.

The Commission considered three issues: (a) the distinction between agent and retailer in EC competition law, (b) clauses relating to the setting of a maximum fuel retail price, and (c) non-compete clauses for fuel, which might foreclose the market.

As regards agency issues, the Commission does not appear to have concluded whether the agents are independent traders or not (in terms of taking commercial or financial risk or not). However, the Commission considered that, "whatever the agent's situation in the light of these criteria, the non-compete clauses ... may be problematic owing to the effects on inter-brand competition",[48] notably, if they lead to market foreclosure. As regards maximum pricing, the Commission was not concerned, since agents were free to grant discounts.

With regard to maximum prices, most of the notified agreements prohibit service station operators from selling fuel at a price higher than the maximum set by Repsol. On the other hand, operators are free to grant discounts. In some cases Repsol simply recommended a retail price and left it to the operators to set the actual price. Since its investigation did not reveal any indications that the setting of maximum prices might create significant alignment effects, there was nothing to suggest a restriction of intra-brand competition.

As to the non-compete clauses, which only cover fuel and not other products intended for sale through service stations, the Commission found that the agreements might facilitate significantly foreclosure on the fuel retail market in Spain. Non-compete clauses were found in more than 2,500 agreements, mainly for a duration of some five years. Where Repsol owned the outlet, the "usufruct" or tenancy arrangement included non-competes ranging from 25 to 40 years.

Due to significant vertical integration of operators, cumulative effects of the parallel networks of vertical restraints, and difficulties arising because of the saturation of the market and the nature of the product, the market was accessible only with difficulty by competitors.[49] In this context the Commission considered that the tied share of Repsol's sales was some 25–35 per cent, the non-compete obligations were of substantial duration, and service station operators and final customers were weak in comparison with suppliers such as Repsol which had a substantial market share.[50]

Repsol proposed the following commitments, to remain valid until May 31, 2010:

- To offer service station operators, with usufruct or tenancy rights with only some 12 years left to run, the option to "buy back" the right *in rem* before the scheduled expiry of their agreements.
- To observe a five-year maximum duration for new fuel distribution agreements with operators where it is not the owner of the service station concerned.
- Not to buy existing service stations which are not already tied to its network outright from their operators until the end of 2006.
- To advertise in advance the expiry of fuel distribution agreements with service stations and the option to terminate in advance agreements involving rights *in rem* via a communication to the Ministry of Economic Affairs made public on the Ministry's website.

46. O.J. C258/7, October 20 2004, on "Article 9 commitments" see MEMO/04/217, September 17, 2004.
47. O.J. C70/29, March 19, 2002.
48. See para.17.
49. See para.23.
50. See para.24.

- A third-party (auditor) to draw up annual reports for the Commission to verify compliance by Repsol with the commitments.

The Commission has announced its intention to adopt a commitment decision accepting these undertakings, finding that Repsol's commitments provide a "practical response to its concerns about the foreclosure effects on the Spanish market". The Commission considered that the commitments would increase the number of outlets open to change supplier from 140–160 service stations *per* year, to more than 400 *per* year. Agreement durations are also considerably shortened and a temporary restraint on Repsol's vertical integration is introduced. The Commission considered that this gives new opportunities for competitors to attain the minimum number of outlets necessary for the economic operation of a distribution system in the sector.

It is an interesting development because there is a lot behind this, above all a cumulative network foreclosure assessment in a case where the supplier has high market share (*i.e.* is above the Vertical Restraints Block Exemption ceilings).

Articles 82–86 EC

Table 3

— *Microsoft*
  * €497 million fine for:
    (i) bundling of Windows and Media Player; and
    (ii) refusal to supply inoperability specifications for server operating systems.
  * "Exceptional" grounds for disclosure even if IP protected.
  * Sophisticated 300-page decision (already appealed).

— *Coca-Cola*
  * Proposed commitments on exclusivity, rebates, tying and some cooler access.

Microsoft[51]

In March 2004, the European Commission issued its long awaited *Microsoft* decision, which has now been published on its website.[52] It is a mere 300 pages long! There is already an enormous amount of discussion and literature on the case. Microsoft has already appealed. The case concerns two main issues:

(1) Microsoft's tying of the Windows operating system with the Windows Media Player.
(2) Microsoft's withholding of interoperability specifications for server operating systems.

As regards Microsoft's tying of Windows to Media Player, since 1999 Microsoft has licensed its successive versions of Windows operating systems only in a bundle with its own Windows "Media Player".[53] The Commission found this to constitute illegal tying under Art.82(d) EC. In the Commission's view, this practice amounts to an abuse of Microsoft's dominant position in the PC operating systems market. The Commission ordered Microsoft to unbundle the two products by making available to PC OEM manufacturers a version of its operating systems that does not include Media Player code.[54]

The Commission concluded that Microsoft holds a dominant position in the PC operating systems market:

> "A dominant position which exhibits extraordinary features since it controls the quasi-standard of the relevant market in question and has done so for some time. Microsoft's dominance relies on high market shares and significant barriers to entry".[55]

The Commission also found that "streaming" media players constitute a market separate from PC operating systems. To support this finding, the Commission relied, among other things, on evidence of demand for streaming media players separate from operating systems (mostly through free internet downloads), as well as the existence of specialised media player vendors such as Real Networks (RealPlayer) and Apple (QuickTime).

The Commission rejected Microsoft's argument that there is no consumer demand for operating systems without a media player. It found that, without Microsoft's bundling, PC OEMs could meet consumer demand for a pre-installed media player by supplying the operating system with a media player other than Media Player.

Then, the Commission found that Microsoft's refusal to license its Windows operating system to OEMs without Media Player constituted tying within the meaning of Art.82(d) EC. In particular, the Commission observed that, although OEMs were free to install additional media player software, they were unable technically to *un*-install Windows Media Player. It also rejected Microsoft's argument that Media Player is included in Windows without "extra charge", because (i) a charge

51. With thanks to Sven Voelcker and Antonio Capobianco for their assistance. See also Banasevic, Pena Castellot, Sitar, Piffaut, *EC Commission Competition Policy Newsletter*, Summer 2004, pp.44–48; and IP/04/382 and MEMO/04/70, March 24, 2004.
52. *www.europa.cu.int/comm/competition/antitrust/cases/decisions/37792/eu.pdf*.
53. See paras 794 *et seq*. Previously, it had bundled the Windows operating system with the media player developed by complainant Real Networks.
54. See paras 1011 *et seq*.
55. See paras 429 and 472.

for Media Player might be "hidden" in the Windows/Media Player bundled price; and (ii) the pricing issue was, in any event irrelevant to the foreclosure concerns that drive the rules against tying.

The Commission then undertook an extensive analysis of the foreclosure effects of tying Media Player to Windows. It found that, given the ubiquity of Microsoft's operating system, suppliers of other media players cannot gain comparable access to customers' PCs. Although the Commission examined other distribution channels (*e.g.* internet downloading and OEM installation agreements), it concluded that none could match the penetration of the Windows operating system.

The Commission also found the ubiquity of Media Player to create incentives for content providers and software developers to encode their products using only Media Player technology. According to the Commission, the rapid growth of Media Player to the detriment of competing media players (measured, *e.g.* on the basis of player usage, format usage, content offered by websites, installed base) shows the exclusionary effects of Microsoft's practice. Elsewhere in the decision, the Commission also noted the potential "chilling effect" of Media Player-style bundling on software developers seeking to develop additional functionalities, whose markets would be pre-empted if Microsoft decided to integrate comparable functions into Windows.[56]

Finally, the Commission considered, but ultimately rejected, several "objective justifications" that Microsoft put forward. As to distribution efficiencies, the Commission noted that the same efficiencies could be obtained if Microsoft offered OEMs the *choice* whether to include Media Player or another media player with PCs they ship. As to possible efficiencies resulting from content and applications developers being able to place calls to Media Player's application programming interfaces ("API"), the Commission also found that such efficiencies could be realised without tying, *i.e.* by OEMs deciding on their own to pre-install Media Player if the latter offers the best functionality.

As regards Microsoft's withholding of interoperability specifications, the Commission found that Microsoft had infringed Art.82 EC by abusing its dominance in the desktop and workgroup server operating system markets[57] in order to achieve and maintain dominance in the latter market. The Commission found that Microsoft had refused to supply Sun Microsystems and other rivals with the specifications for protocols that Windows workgroup servers use.

By refusing to do so, Microsoft kept those companies from implementing such specifications to develop fully interoperable workgroup server operating system products. As a remedy, the Commission ordered Microsoft to provide all interested parties with the necessary interoperability specifications within 120 days on reasonable and non-discriminatory terms.[58]

The Commission found Microsoft dominant not only in the market for PC operating systems, but also in the market for workgroup server operating systems, delivering file, print and group and user administration services in small to medium-sized networks. Microsoft vigorously argued that there is not a separate market for such a narrow category of server operating systems (Microsoft has a much weaker market position for other types of server operating systems, in particular for high-end servers). The company argued that the same operating systems could be used for all types of servers, regardless of what tasks the servers performed, and that operating systems for higher-end types of servers could easily be "slimmed down" to be sold as workgroup server operating systems.

The Commission responded that Microsoft itself offers a differentiated range of server operating systems for different tasks at significantly different prices. Moreover, it found that due to their frequent interaction with client PCs, workgroup server operating systems require a higher degree of interoperability than operating systems for other types of servers and are thus not substitutable by other types of servers. This also led the Commission to conclude that competitors could not easily "scale down" operating systems originally designed for higher-end servers, since those usually do not offer the same degree of interoperability with client PCs as workgroup servers do.

In the market for workgroup server operating systems, the Commission estimated that Microsoft's market share exceeds 60 per cent. In addition, it emphasised the close links with the market for PC operating systems due to interoperability requirements. Referring in particular to the *Tetra Pak II* judgment, it inferred from those links that Microsoft should be considered dominant in *both* markets. Nevertheless, it appears that the Commission links Microsoft's abusive behaviour primarily to its dominance in the market for PC operating systems.

The Commission found that Microsoft had abused its dominant position by refusing to supply specifications for both client-to-server and server-to-server protocols that would enable competing server operating systems software to fully operate with the Windows domain architecture.[59]

The Commission reached this conclusion despite its explicit recognition that disclosure of the

56. See para.983.
57. See para.541.
58. See paras 999 *et seq.*
59. See paras 546 *et seq.* and 779–784.

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relevant protocols could impinge on Microsoft's intellectual property rights. Although recognising that refusals to license intellectual property can constitute an abuse only in exceptional circumstances, the Commission refused to be bound by an "exhaustive checklist" of such circumstances as set out in *Magill*[60] or other judgments by the European Court.

Here, the Commission found the following facts to constitute exceptional circumstances justifying the finding of an abuse.[61]

- First, Microsoft's refusal to disclose protocol specifications amounted to a disruption of "previous levels of supply". In particular, the Commission found that Microsoft made such disclosures before it had a credible server operating systems offering, but deliberately discontinued them after it developed one, in order to disadvantage its rivals.
- Secondly, Microsoft's refusal to disclose protocol specifications risked eliminating competition in the workgroup server operating systems market, as demonstrated by Microsoft's "rapid rise to dominance" in that market.
- Thirdly, the Commission emphasised that interoperability disclosures were indispensable for rivals to compete, and that open industry standards supported in Windows, the distribution of client-side software by the server operating systems vendor, or reverse engineering of Microsoft's products, provided no viable substitute.
- Fourthly, the Commission found that Microsoft's conduct was not justified by the protection of its intellectual property rights. "On balance", any disincentives for future innovation by Microsoft resulting from the compulsory disclosure of such IP rights would be outweighed by the substantial promotion of competitive innovation in the market as a whole.[62] The Commission repeatedly pointed out that it was not requiring Microsoft to disclose the actual source code of its operating systems, but only the specifications necessary to ensure interoperability.

The Commission also fined Microsoft €497 million, a huge sum in EC terms.

Clearstream

In June 2004, the Commission adopted a decision against Clearstream International,[63] having sent a Statement of Objections in March 2003 alleging abuse of dominance.[64] In its decision, the Commission identified two types of abuse: refusal to supply and discriminatory pricing.

The Commission noted that Clearstream was the only "final custodian of German securities kept in collective safe custody", and that Clearstream was an unavoidable trading partner for intermediaries seeking clearing and settlement services for the registration of shares under German law. New market entry was unrealistic.

Consequently, by refusing Euroclear Bank SA access to settlement services for German registered shares for some two years, Clearstream had abused its dominant position. The Commission also noted that Euroclear could not duplicate the services that it was requesting, and that the refusal had the effect of impairing Euroclear's ability to provide an efficient cross-border service in the downstream market for cross-border clearing and settlement of EU securities.

The Commission found discrimination because of the unreasonable delay with which Clearstream eventually supplied Euroclear (two years) in comparison with other customers (four months). Moreover, by charging Euroclear a higher *per* transaction price than other securities depositories outside Germany in the years between 1997 and 2001, Clearstream had also discriminated in its prices to Euroclear.

By the time the Commission adopted its decision, the infringements had ceased. No fine was imposed, because account was taken of the fact that there was no EC case law dealing with the relevant issues, and because clearing and settlement services in the EU are evolving, in particular as regards cross-border transactions.[65]

Interbrew

Following last year's settlement with regard to Interbrew's "tied house" purchasing system on the retail level in Belgium,[66] in April 2004, the Commission closed a procedure concerning Interbrew's rebate practices in relation to Belgian beer wholesalers, after it had received a series of commitments.[67] The Commission specifically stated that Interbrew's amended commercial practices do not constitute an abuse of Interbrew's alleged dominant position on the Belgian beer market.

As regards its rebate system, Interbrew offers standardised volume rebates based on the total

60. Joined cases C–241/91P and C–242/91P, *RTE and ITP v Commission* [1995] E.C.R., I-743.
61. See paras 578 *et seq*.
62. See paras 709 *et seq*. especially at para.783.
63. IP/04/705, June 2, 2004, see also Martinez Rivero and Buftan, *EC Commission Competition Policy Newsletter*, Summer 2004, p.49.
64. IP/03/462, March 31, 2003; [2004] I.C.C.L.R. 69.
65. The Commission has also published a study on current arrangements in the securities area, dealing with clearing, central counterparties and securities settlement; details are available on the Commission's website at the competition page. The main interest from the competition perspective is that the Commission has said that it plans to address (with NCAs) anti-competitive practices in the sector and to monitor existing monopoly positions and further industry consolidation.
66. IP/03/545, April 15, 2003; [2004] I.C.C.L.R. at 63.
67. IP/04/574, April 30, 2004.

volume of each type of beer purchased by a wholesaler in a year, paying the rebate for each category of beer. Rebates will be more transparent in the sense that wholesalers will know the full rebate scale. Wholesalers which sell Interbrew's beer through their own tied retail outlets also receive separate rebates for each type of beer sold. However, these will no longer increase as a function of the number of the wholesalers' tied outlets. Instead, they are paid for fixed amounts of particular beers sold, irrespective of the number of outlets.

Interbrew also has some "management support" partnership agreements with wholesalers. Interbrew will no longer have the pre-emption right to buy the wholesaler's business in the event of a competitor's bid. Moreover, it will no longer have access to the wholesaler's confidential business data.

Interbrew also has commercial agreements with wholesalers, according to which Interbrew grants them incentives in return for promotional activities. In these agreements, Interbrew will abolish product exclusivity requirements, make the eligibility criteria fully transparent and clarify that the same incentives are open to all wholesalers.

Finally, Interbrew has terminated its distribution agreement with its competitor Haacht, according to which Interbrew beers have benefited from exclusive access to retail outlets tied to Haacht.

Interbrew agreed to introduce these changes by December 31, 2004.

Proposed Coca–Cola Settlement

In September 2004, after a five-year investigation, the Commission decided to initiate proceedings with a view to adopting a commitment decision pursuant to Art.9 of Regulation 1/2003 in relation to Coca-Cola's commercial practices in the EU. The commitments from Coca-Cola were received in October and are published on the Commission's website for third-party comments.[68]

These commitments establish rules which will govern the practices of The Coca-Cola Company and its bottlers, and are applicable to all sales of all carbonated soft drinks under the Coca-Cola brand destined for consumption in countries where Coca-Cola or its bottlers may be subject to Art.82 EC or Art.54 of the EEA agreement. They concern the take-home and on-premise channels, sponsorship and public and private tender agreements and technical equipment placement.

The main commitments proposed are as follows:

- Coca-Cola customers will remain free to buy and sell any third-party carbonated soft drinks and will not be required to purchase a specified minimum percentage of their total requirements.
- Coca-cola will offer no target or growth rebates and no tying provisions linking Coca-Cola branded cola or orange to other products in its range.
- Where Coca-Cola agreements include shelf space commitments, these will be non-exclusive and defined separately for Cola and orange carbonated soft drinks.
- Where Coca-Cola sponsors venues, it will not require that non-Coca-Cola branded soft drinks will not be available in the venue, other than in respect of the sponsoring brands or flavour categories.
- Where Coca-Cola sponsors limited duration events, exclusive supply rights for the full range of Coca-Cola's soft drinks may be linked to the sponsorship agreement, provided that the event does not exceed 60 days per year.
- However, Coca-Cola may compete for and enter into public tender agreements containing exclusive beverage supply rights.
- The same applies for private tender agreements, provided that they are limited to a maximum of five years and give the customer an annual option to terminate the agreement without penalty after an initial term not exceeding three years.

There are particular provisions as regards "coolers"/vending machines:

- Where Coca-Cola provides a beverage cooler on a rent-free basis and the customer does not have any other installed chilled beverage capacity to which the consumer has direct access, the customer will be free to use at least 20 per cent of that cooler's capacity for any products of its choosing.
- Where the cooler is being provided in exchange for rental payments, the customer will also be free to stock any products of its choosing in at least 20 per cent of the cooler's capacity.
- If the customer has purchased the cooler from Coca-Cola or a manufacturer to which Coca-Cola refers the customer, it will be free to stock the cooler with any products of its choosing.
- Furthermore, Coca-Cola will not require customers to refrain from placing competing fountain dispensers or packaged carbonated soft drinks on any premises, while purchase commitments for products sold through fountain dispensers will not exceed three years and customers will have the option to terminate such commitments without penalty with effect at any time following an initial term not exceeding three years.

68. IP/04/1247, October 19, 2004; see also now the Art.27(4) notice published at O.J. C289/10, November 26, 2004.

- No agreement under which Coca-Cola provides vending machines will require that the customer refrains from placing competing vending machines on any premises.

This is almost an anti-climactic proposed settlement, since many had expected a major fight. We will have to see what the final decision looks like. However, thus far, it is interesting to see that the Commission appears to be requiring unbundling *within* a product family. If so, that is a new development. Equally, dominant companies may be encouraged to see the Commission allowing exclusivity for specific contexts, such as sponsorship and in the context of tenders.

The "Coca-Cola companies" concerned propose to apply the commitments throughout the EU, Norway and Iceland insofar as Coca-Cola branded carbonated soft drinks ("CSD") accounted, in the year, for more than 40 per cent and more than twice the share of the nearest competitor of national CSD sales in either the take-home or on-premises sales channel.

Telecoms issues

In December 2003, the Commission issued a Statement of Objections to Telia Sonera ("TS") alleging that TS had abused its dominant position in the markets for the provision of local broadband infrastructure and the provision of high-speed internet access, by intentionally bidding below cost for the construction and operation of such a network for HSB Malmö, a regional housing association.[69] It appears that in October 1999, Telia, which was not yet merged with Sonera and owned approximately 90 per cent of the local infrastructure susceptible to be used for the provision of high-speed internet access, won a bid for a contract with HSB Malmö, the second largest co-operative housing association in Sweden, to construct a new fibre-optic network and provide broadband services to households in the Malmö region exclusively for five years. A competitor, B2 Bredband AB, complained.

In March 2004, the Commission terminated its investigation of alleged abusive margin squeezing by Deutsche Telekom ("DT") in the provision of broadband access to its fixed telecommunications network.[70] DT was considered to be the dominant supplier of broadband access both at wholesale and at retail level, and the only operator with a network of nationwide coverage. DT also accounted for almost 90 per cent of the retail market. Competitors of DT alleged that its tariffs for line-sharing were so high that they could not make any profits from offering the broadband service at retail level. There was only a tight margin between the line-sharing tariff of DT and the end consumer price for broadband service via ADSL, which prevented entry to the market by new competitors. Line sharing tariffs were introduced by the German Regulator in March 2002 and it is on that date that DT's practice allegedly started.

The Commission decided to accept commitments proposed by DT in this case and not to open formal proceedings. DT committed to stop charging its competitors monthly line sharing from April 2004 until the end of 2004 and to substantially reduce the current line sharing tariffs from the beginning of 2005. Additionally, DT decided to increase certain of its retail ADSL tariffs.

German mail rules

In October 2004, the Commission addressed a decision pursuant to Arts 86(3) and 82 EC against Germany concerning its legal postal regulatory framework.[71] According to certain provisions thereof, private senders are allowed to feed self-prepared mail directly into Deutsche Post's sorting centres and are granted discounts for doing so, while commercial mail preparation firms are not given such discounts.

The Commission considered that the respective provisions induced Deutsche Post, which has the exclusive rights to distribute letters below 100 grams, to discriminate against commercial sorting operators, placing them at a considerable competitive disadvantage. Germany was given two months to inform the Commission of the measures taken to comply with EC competition law.

Current policy issues

Table 4

— *Legal Privilege*
  * *Akzo Nobel*:
    - Privilege for preparatory material before approaching counsel
    - And for in-house lawyers, members of a Bar?

— *Private actions for damages*
  * A Green Paper to come; debate launched

— *Art.82 EC Guidelines*
  * Clear work going on:
    - How to modernise classic European Court case-law?
    - With a rebuttable presumption for some effect cases, involving efficiencies?

Legal privilege

There are some interesting signs of possible elaboration of legal privilege. Perhaps not a revolution,

69. IP/03/1797, December 19, 2003.
70. IP/04/281, March 1, 2004.
71. IP/04/1254, October 20, 2004.

but some extension of the scope of the privilege, resulting from recent court proceedings involving Akzo Nobel.

In February 2003, the Commission issued a decision ordering Akzo Nobel, Akcros Chemicals and their subsidiaries to submit to an investigation under Art.14(3) of Regulation 17. The Commission carried out an onsite inspection at the companies' premises, during which a dispute arose between the Commission officials and company representatives with respect to five documents which the company claimed to be covered by professional privilege.

Copies of two of these documents, allegedly drafted for the purpose of a telephone conversation with an outside counsel, were placed in a sealed envelope. The remaining three documents were simply copied and not treated in any special way. These contained a series of handwritten notes by the General Manager of Akcros Chemicals, drafted during discussions with lower level employees for the purpose of preparing the sealed documents, as well as an exchange of emails between the General Manager of Akcros Chemicals and Akzo Nobel's competition law coordinator, who was a member of the Dutch Bar and also a member of Akzo Nobel's legal department employed by Akzo on a permanent basis.

Through applications for interim measures, the question of the possible privilege applying to these various documents came before the President of the CFI, who made a number of interesting observations.[71a]

First, as regards the "sealed documents", the President considered that there might be a need to extend the scope of professional privilege, as defined by the case law, in order to cover also working or summary documents drafted for the sole purpose of obtaining the assistance of a lawyer.[72] Interestingly that might include the review of facts connected with a current investigation or an investigation which a company might reasonably fear or anticipate, and where therefore the company might choose to prepare in defence in advance.[73] As regards the handwritten notes, the President took a similar view.

Secondly, as regards the email exchange with an in-house counsel admitted to the Dutch Bar, the judge first noted that the emails were not, in principle, covered by professional privilege on *AM&S*.[73a] However, the President stated that such a rule might need review since *AM&S*, especially where in-house counsel were members of a Bar.[74]

Thirdly, the President also underlined that legal privilege is not just about rights of the defence, it is about the right of every person to consult a lawyer without constraint.[75] This is something which seems to have been forgotten in recent years where regulators sometimes see privilege as an abusive tactic to avoid detection of competition law infringements, rather than a fundamental value and right.

Many are now watching with great interest how the Court will interpret legal privilege in the main proceedings, conscious that an internal summary of external legal advice is already privileged and that not to allow a company to prepare material for the purpose of consulting external counsel may be both counter-productive in undermining genuine compliance steps and at odds with the fundamental right just noted. (The President's actual ruling turns on the interim nature of his review and the specific balance of interest in the circumstances and has been appealed to the ECJ since.)

Private actions for damages

The Commission is now pushing to promote more private actions to enforce the competition rules,[76] although conscious that there have been few damages awards. In practice, such actions are still very difficult (although there have been some settlements). The Commission has sought a (major) study on the conditions for claims for damages, prepared by Ashurst, which has now been published on DG COMP's website. There is also a useful article in the Commission's Newsletter summarising the related issues and some of the existing damages awards, notably in France and Sweden.[77] The Commission states that it envisages a Green Paper to identify potential ways forward.

Article 82 EC Guidelines

The Commission is also thinking seriously about modernisation of Art.82 EC enforcement. At the time of writing, it appears that the Commission does not plan any discussion draft until the middle of 2005 at the earliest.

In October 2004, Mr Monti emphasised that, in this area, the EU position may be driven by different interpretations and considerations to those in the United States.

Substantively, there is much discussion about whether and if so, how to allow the dominant to compete more, based on efficiency arguments.[78]

71a. Joined cases T–125/03R and T–253/03R, October 30, 2003.
72. [102]–[109].
73. [113].
73a. Case 155/79, [1982] E.C.R. 1575.
74. [122].
75. [167].
76. See, Mr Monti's Paper at the IBA meeting in Fiesole SPEECH/04/403, September 17, 2004.
77. See Woods, Sinclair and Ashton, *EC Commission Competition Policy Newsletter*, Summer 2004, pp.31–37.
78. See also Ratliff, "Abuse of Dominant Position and Pricing Practices—A Practioner's Viewpoint", *EUI Proceedings, Florence* (Hart Publishing, June 2003) and available at *www.iue.it.*

There is also debate about the extent to which competitors of the dominant should have equal opportunities to compete and develop the critical mass to survive in the market.

There is debate about whether *per se* rules are appropriate, although, as noted in the first part of this paper, at least in the case of loyalty rebates, the European Court appears to consider such an approach valid, given the market strength of the dominant. Against this, part of the whole "modernising" process has been to focus on effects. If effects are not unreasonable in economic terms, should not a dominant company be allowed to pursue its often self-created, rather than incumbent successful business? Predictability is also considered key, so that companies can comply reasonably easily on the basis of practical tests.

It also appears that the Commission is willing to allow dominant companies greater use of Art.81(3) EC.

Areas of specific interest

Table 5

- *Liberal Professions*
  - * *Belgian architects* fine.
    - Recommended minimum fee system.
  - * Competition Advocacy/Communication.
    - Serious drive on blatantly unjustified or disproportionate restrictions.
    - Others may involve more difficult balancing.
- *Energy*
  - * A marathon "Marathon" (where the runner dropped out long ago?!)
    - Entry/exit fee systems and multiple zone charges.
  - * Decisions on territorial restrictions announced.
- *Sport/Media*
  - * Packaging of football media rights and a decision at last!
  - * Hollywood Studios MFN clauses withdrawn (mainly).

Liberal professions

Belgian architects fee system

In June 2004, the Commission fined the Belgian Architects Association €100,000, concluding that its scale of recommended minimum fees was a violation of the EC competition rules.[79]

The recommended prices were considered to facilitate price co-ordination. In the Commission's view, such fees should reflect an architect's skills, efficiency, costs and perhaps reputation and should not be dependent solely on the value of the works or the price of the entrepreneur. In any event, the architect should determine the fee independently of competitors and in agreement with the client alone.

The amount of the fine was stated to reflect a gradual approach by the Commission in fining anti-competitive practices in the professions and also the fact that the fee scale was abolished in 2003. The Commission also noted that the French Competition Council prohibited the French Architects' Association from further elaborating and distributing fee scales in 1997, while the UK Office of Fair Trading also came to the conclusion that the Royal Institute of British Architects' (RIBA) indicative fee guidance could facilitate collusion.

Commission "Communication"

In February 2004, the Commission issued a "Communication on Competition in Professional Services".[80] This is a follow-up to the detailed "Vienna Study" commissioned and published last year, as well as the related Commission conference.

The Communication is a clear piece of competition advocacy, as the Commission invites professional associations to review the proportionality of any restrictive practices into which they have entered, with the threat of NCA or European Commission intervention against unjustified practices, whether directly against the professions concerned, or indirectly by "disallowing" or otherwise challenging laws contrary to Arts 10 and 81 EC.[81]

Clearly the Commission may have a point concerning some of the more blatant, often old practices. However, in many areas this will be a far more complex debate than the Communication suggests.

On *Wouters*, it is clear that restrictions may be justified and outside Art.81(1) EC in specific circumstances, if essential to preserve core values of a profession. It is also perfectly valid on *Arduino* to propose suggested restrictions to public authorities which, after appropriate review, may choose to adopt them as their own regulations.

On the other hand, in some circumstances, state action may be challenged as merely "facilitating" an anti-competitive agreement which is contrary to Art.81(1) EC and patently disproportionate private restrictions clearly may fall within Art.81(1) EC. National competition authorities also have a duty to disallow such laws on *Italian Matches*.

However, judging the proportionality of a state measure can be difficult, especially where the state overtly wishes to further specific universal (public) service or quality value considerations.[82]

It is a little disconcerting to see the Commission arguing (as occurred after the detailed study last

79. IP/04/800, June 24, 2004.

80. COM (2004) 83 final, available on the Commission's website; IP/04/185, February 9, 2004.

81. See also Amato, Collins, De Waele, Paseman, *EC Commission Competition Policy Newsletter*, Summer 2004, pp.71–74.

82. See Ratliff, "EC Competition Law and the Liberal Professions", Paper at IBC London, April 2004.

year) that just because some Member States take a very "liberal" approach with one notion of service, others with more restrictive systems supporting a different notion of service are necessarily following disproportionate solutions.

One may also think that there is a middle path, in which key professional values associated with liberal professions can be reasonably balanced with competition. However, at the moment the Commission's advocacy is clearly aimed to push fast for change, at least as regards those restrictions which are *not* reasonable in this sense.

Energy

More "Marathon" settlements

In April 2004, the French and the German gas companies, *Gaz de France* and *Ruhrgas*, offered commitments to improve third-party access to their respective networks, thereby settling the Commission's investigation into their alleged refusal to grant the Norwegian subsidiary of the US gas producer, Marathon, access to their networks.[83]

It may be recalled that in April and July 2003 the Commission announced that it had settled with *Gasunie* and *BEB*, having previously settled the case with *Thyssengas* in November 2001.[84]

The commitments by Gaz de France and Ruhrgas, which reflect the market situation in each country and are therefore not identical, will remain in force for several years. Their fulfilment will be monitored by a trustee who is to report to DG Competition.

The main commitments made by Gaz de France are:

- Gradual reduction in the number of tariff and balancing zones on which the entry/exit transport system is based in France. The idea is to reduce the number of zones from seven to two by 2009, facilitating access for new entrants by reducing the cost of transport connected with the crossing of several zones.
- Starting in January 2005, the transport division of Gaz de France will offer operators the possibility *to* convert high calorific value gas into low calorific value gas, thus giving greater access to gas which can be used to compete for low calorific gas users (a large part of the French market).
- Starting in January 2005, for three years, Gaz de France has undertaken to implement a "gas release programme" in southern France, where there is currently no competition.

The main commitments by Ruhrgas are:

- There will be a new regime allowing customers to book gas transport capacities separately at entry and exit points, without booking any capacity between the two points.
- Ruhrgas will introduce six tariff zones, which it will progressively reduce to four by May 2006.
- Ruhrgas will extend the new entry/exit regime beyond its own network, to include other regional transmission companies in which it holds a majority or minority stake.

In addition to these commitments, Gaz de France and Ruhrgas will improve transparency, handling of requests for network access and congestion management. Ruhrgas also promised to introduce the so-called "use-it-or-lose-it" principle into all its transport contracts.

Territorial restrictions

In October 2004, the Commission announced that it had taken two decisions concerning territorial restrictions in the gas sector.[85] They concern two contracts concluded by Gaz de France in 1997, one with ENI, and the other with ENEL.

Under a transport contract between GdF and ENI, GdF transports gas bought by ENI in northern Europe through French territory to the border with Switzerland. This contract contained a clause obliging ENI to market the gas only after leaving France ("downstream of the redelivery point"). The contract between GdF and ENEL concerned swaps of gas purchased by ENEL in Nigeria and required ENEL to use the gas only in Italy. The Commission considered that these clauses partitioned national markets by preventing French consumers from being supplied by ENI and ENEL.

The Commission adopted the two decisions, although the parties had already terminated the infringements, with a view to clarifying the situation for all undertakings operating in the gas sector.

Sport and media

UEFA Champions League

In November 2003, the Commission published its (long awaited) decision in the *UEFA Championships League* case.[86]

It may be recalled that the Commission considers the collective, exclusive sale by UEFA on behalf of national clubs or football associations of the broadcasting rights to the final stages of the UEFA

83. IP/04/573, April 30, 2004
84. IP/03/547, April 16, 2003, IP/03/1129, July 29, 2003; [2004] ICCLR 72; IP/01/1641, November 23, 2001; [2003] I.C.C.L.R. 111.
85. IP/04/1310, October 26, 2004.
86. [2003] O.J. L291/25, November 8, 2003. See Toft, *EC Commission Competition Policy Newsletter*, Autumn 2003, p.47.

Champions League to be a price-fixing agreement and an output restriction which limits the broadcasting of football.[87] Such awards are also considered to distort competition in broadcasting markets for which football is key content.

In August 2002, however, the Commission published an Art.9(3) Notice, proposing to take a favourable position on UEFA's revised commercial policy under which UEFA would award the television rights following a public invitation to bid to broadcasters for various packages of media rights.[88]

In its decision, the Commission distinguished the following relevant markets:

- The upstream markets for the sale and acquisition of free-TV, pay-TV and pay-per-view rights;
- the downstream markets on which television broadcasters compete for advertising revenue depending on audience rates, and for pay-TV/pay-per-view subscribers;
- the markets for media rights for new media (wireless/3G/UMTS rights, internet rights and video-on-demand rights); and
- the markets for other commercial rights, namely sponsorship, "suppliership" and licensing.

As regards notably the upstream markets for television and pay-per-view rights, the Commission considered several factors in relation to the special value of broadcasting rights for football events, which can be attributed to this sport's ability to act as a developer of a brand image of channels and to attract the most sought-after viewers (*i.e.* men with an above average spending power and who are in the age groups of 16–20 and 35–40).

The Commission then concluded that there existed a separate market for the acquisition of television broadcasting rights to football which is played regularly throughout every year.[89] This definition involved matches in national league and cup events, as well as the UEFA Champions League and UEFA Cup.

Interestingly the Commission concluded that:

> "... there are no programmes which place a competitive constraint on the ability of the holder of the TV rights to football events being played regularly throughout every year to determine the price of these TV rights. *TV rights to other sports events or other types of programmes such as feature films do not put a competitive restraint on the holder of the TV rights to such football events*. Including such rights in the market definition would make the definition too wide. In other words, there is no substitutability between the TV rights to football and the TV rights to other programmes."[90] (Emphasis added).

The Commission found that the grant by football clubs to UEFA of the exclusive right to sell jointly certain commercial rights on behalf of the clubs fell within Art.81(1) EC, as did the restrictions on the football clubs selling their commercial rights individually. The Commission noted, however, that UEFA might be the co-owner of some of the media rights as a result of its role in organising the League and UEFA "brand image" (without purporting to rule on the issue). The Commission then concluded that an Art.81(3) EC exemption was justified.

Through the joint selling arrangements, a quality branded content product sold in packages via a single point of sale was created, thus providing advantages for media operators, football clubs and viewers. Media operators and consumers could receive more efficient and easier access to a unique content which, in addition, was carrying the UEFA Champions League brand label.

The joint arrangement not only created efficiencies for media operators, which would be able to invest in improved production and transmission technologies, but also allowed viewers to obtain access to better quality media coverage, enabling them to watch all premium matches over the course of the entire season.

The Commission also accepted that the restrictions were indispensable to provide the efficiencies and improvements leading to consumers benefits, as long as the joint selling body was able to find demand for the jointly sold media rights.[91]

Finally, the Commission accepted that the arrangements did not eliminate competition. The Commission found that (i) UEFA Champions League rights represented only some 20 per cent of the relevant market; (ii) the jointly sold media rights had been split up into packages offered for sale in a competitive bidding procedure open to all interested media operators; and (iii) both UEFA and the football clubs sold certain categories of these rights on a non-exclusive basis.

However, the Commission found that no benefits arose from the restriction on football clubs selling live television rights to free-TV broadcasters and subjected its decision to the condition that football clubs be able to do so where there was no reasonable offer from any pay-TV broadcaster. The duration of the exemption was set for two contract periods with expiry on July 31, 2009.

English FA Premier League

In December 2003, the Commission also announced that it had reached a "provisional agreement" with the English FA Premier League concerning the joint selling of media rights to Premier League matches.[92]

87. [2003] I.C.C.L.R. at 112.
88. [2002] O.J. C196/3, August 17, 2002; see also IP/02/806, June 3, 2002.
89. See para.63.
90. See para.77.
91. See paras 136–180.
92. IP/03/1748, December 16, 2003.

The League has agreed that after 2006 there would be at least two television broadcasters of live League matches. The League would create "balanced packages" of matches "showcasing" the Premier League as a whole, and no broadcaster would be allowed to buy all of the packages. The auctions will be examined by the Commission and Premier League to ensure that they do not exclude potential competitors.

BSkyB, which recently acquired the television rights to Premier League matches, has also agreed to offer to sub-license a set of up to eight top quality Premier League matches each season to another broadcaster (starting next season).

German Bundesliga

In September 2004, the Commission published an Art.27(4) Notice in relation to the joint selling of media rights to the German Bundesliga.[93] This is another Regulation 1/2003 development, insofar as it is a notice indicating that, subject to market testing, the Commission is planning to take an Art.9 decision declaring commitments binding, and inviting comments on such proposed action. The commitments are summarised in the Official Journal, but the actual terms are published on the Commission's website. Substantively, the commitments fit the same sort of standard pattern as the *UEFA* case.

The Commission is concerned that if *all* the media rights to the first and second German football leagues are sold through a central marketing system, then clubs lose the right to sell their rights in packages and at prices of their own choosing. Moreover, there is concern that obtaining the rights can have crucial significance to downstream advertising and pay-per-view markets, for which such content may be important.

As a result, the clubs are authorised to transfer media rights to the Bundesliga, but these are then offered to "exploiters" in 10 packages, according to content and transmission medium (*e.g.* live, "near live" and deferred transmission of matches, highlights etc. for free-to-air television, pay-per-view, internet and mobile phones, etc.). Rights packages are for a maximum of three seasons and clubs retain rights to sell home games to free-to-air television broadcasters and home and away game extracts on the internet. Unused rights may also be exploited by the clubs. The Commission has reserved its position should one company acquire several centrally-marketed packages with exclusive rights.

Finally, we should note that in January 2004, the Commission announced a sectoral investigation in the sale of sports rights to internet companies and to providers of third generation mobile phone services, with a view to acquiring comprehensive information on the availability of audiovisual sports rights in the European Union and on possible relevant anti-competitive practices that need to be addressed.[94]

Hollywood film studios

In October 2004, the Commission closed its investigation into the so-called "output deals" between six major Hollywood film studios and a number of pay-television companies in the EU.[95] Output deals, which are common in the Hollywood film industry, are agreements whereby the studios agree to sell to broadcasters their *entire* film productions for a given period of years.

The Commission objected to so-called "most favoured nation" clauses which gave the studios the right to enjoy the most favourable terms agreed between a pay-TV company and any one of them, because the Commission considered that the cumulative effect of these clauses distorted price competition. In particular, any increase agreed with *one* of these studios would trigger the right to parallel increases for the prices of other studios.

Six studios have either withdrawn the clause or waived their related rights. Two studios, NBC Universal and Paramount, have not agreed to withdraw the clause from their respective contracts.

International

EU-related issues in US courts

Two cases decided in the United States Supreme Court in June 2004 deserve comment for their European interest.[96]

First, in *F. Hoffmann-La Roche Ltd v Empagran SA*, the Supreme Court set aside a lower court ruling under which purchasers that had bought a cartelised product outside the United States from non-US sellers could nonetheless sue for treble damages in the US courts, if the conspiracy had some effect in the United States. The issue hinged on the interpretation of the US Foreign Trade Antitrust Improvements Act of 1982, a statute that was meant to clarify the extent to which the US antitrust laws apply to foreign conduct.

The Supreme Court's ruling cut back on the scope of recovery for purchasers outside the United States, but did not wholly close the issue. The Court said that foreign purchasers could not sue in the United States when their injury from the cartel is "independent" of the cartel's effect in the United States. As might be expected, the question as to

93. O.J. C229/13, September 14, 2004.

94. IP/04/134, January 30, 2004.

95. IP/04/1314, October 26, 2004.

96. With thanks to Chuck Stark for his assistance. See further, *Antitrust and Competition Law Update*, June 2004, available at *wilmerhale.com*.

when foreign and US injuries are "independent" of one another is now being litigated in the US cases.

Secondly, in *Intel Corp v Advanced Micro Devices Inc*, the Supreme Court held that US legislation aimed at securing US-located evidence to assist foreign tribunals, 28 USC s.1782, could be used by a complainant in a non-US antitrust investigation to obtain discovery from the company against which it was complaining. AMD, a US-based semiconductor maker, had complained to the European Commission about conduct by its rival, Intel, that AMD argued constituted an abuse of a dominant position by Intel. AMD had asked the Commission to require Intel to provide the Commission with documents which Intel had produced in US intellectual property litigation with another company, but the Commission declined to do so. AMD then brought an action in a US Federal Court seeking the Intel documents so that AMD could give them to the Commission.

The Commission filed an *amicus* brief arguing that US discovery should not be available to complainants in Commission investigations. It argued that it was not a "tribunal" within the meaning of the US legislation and that allowing such discovery would interfere with its own proceedings. The Court nonetheless held that the statute allows discovery in such cases, but noted that it leaves the District Court with substantial discretion as to whether or on what terms to allow discovery. The case was remanded to the District Court, which then declined to grant AMD's discovery request on the grounds, *inter alia,* that the Commission had made clear that it did not want the material and did not welcome the US court's "assistance".

EU-China and Korea competition dialogues

In May 2004, Mr Monti and the Chinese Commerce Minister signed an agreement on a "structured dialogue" on competition between the European Union and China.[97] This agreement is a follow-up to a declaration signed in November 2003 between the Commissioner and the ministerial authorities that are responsible for the drafting of the new Chinese competition law.[98]

The agreement constitutes the basis for a formal dialogue having as its primary objective a "permanent forum of consultation and transparency" between China and the EU in this area.

In October 2004, Mr Monti and the Chairman of the Korean Fair Trade Commission appear to have signed a similar Memorandum of Understanding on a similar "structured dialogue" on competition between the EU and Korea.[99] This Memorandum is perceived as the basis for a formal dialogue between the EU and the Republic of Korea which makes official the existing co-operation practices.

97. IP/04/597, May 6, 2004.
98. IP/03/1587, November 24, 2003.
99. IP/04/1325, October 28, 2004.

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